S. HRG. 101-694

MORAL RIGHTS IN OUR COPYRIGHT LAWS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 1198

A BILL TO AMEND TITLE 17, UNITED STATES CODE, TO PROVIDE CERTAIN RIGHTS OF ATTRIBUTION AND INTEGRITY TO AUTHORS OF WORKS OF VISUAL ART

AND

S. 1253

A BILL TO AMEND THE COPYRIGHT LAW REGARDING WORK MADE FOR HIRE

JUNE 20, SEPTEMBER 20, AND OCTOBER 24, 1989

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CONTENTS

Hearings held on: Page

Tuesday, June 20, 1989 1
Wednesday, September 20, 1989 187
Tuesday, October 24, 1989 755

STATEMENTS OF COMMITTEE MEMBERS

DeConcini, Hon. Dennis, a U.S. Senator from the State of Arizona 1, 187, 755
Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts 16
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah 19, 188, 190, 756
Grassley, Hon. Charles E., a U.S. Senator from the State of Iowa 75, 193, 761
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont 757
Simpson, Hon. Alan K., a U.S. Senator from the State of Wyoming 759

PROPOSED LEGISLATION

S. 1198, a bill to amend title 17, United States Code, to provide certain rights of attribution and integrity to authors of works of visual art 3
S. 1253, a bill to amend the copyright law regarding work made for hire 194

CHRONOLOGICAL LIST OF WITNESSES

TUESDAY, JUNE 20, 1989

Edward Damich, professor of law, George Mason University Law School, Arlington, VA 26
Robert Gorman, Kenneth W. Gemmill professor of law, University of Pennsylvania Law School, Philadelphia, PA 44
Jack E. Brown, Esq., law firm of Brown & Bain, Phoenix, AZ 54
Linda Cawley, on behalf of Peter H. Karlen, attorney at law, La Jolla, CA 87
Tom van Sant, artist, Santa Monica, CA 121
Marc F. Wilson, director, Nelson-Atkins Museum of Art, Kansas City, MO 131

ADDITIONAL SUBMISSION FOR THE RECORD

Statement of Ralph Oman, Register of Coyprights, on S. 1198 145

WEDNESDAY, SEPTEMBER 20, 1989

Hon. Thad Cochran, a U.S. Senator from the State of Mississippi 196
Ralph Oman, Register of Copyrights, Washington, DC, accompanied by Dorothy Schrader, general counsel, and William Patry, Policy Planning Advisor to Register of Copyrights 203
Richard Weisgrau, executive director, American Society of Magazine Photographers, New York, NY 237
Jay Maisel, photographer, New York, NY 513
Don Martin, cartoonist, Studios of Don Martin, Miami, FL, representing the Graphic Artists Guild 524
Tom Clancy, author, Huntington, MD 533
Michael R. Klipper, Leventhal, Senter & Lerman, Washington, DC, representing the Committee for America's Copyright Community 566
Victor Kovner, chairman, legal affairs committee, Magazine Publishers of America, New York, NY 641
Nicholas A. Veliotes, president, Association of American Publishers, Washington, DC 658
R. Jack Fishman, publisher, Lakeway Publishers, Morristown, TN, representing the National Newspaper Association 678

ADDITIONAL SUBMISSIONS FOR THE RECORD

Letters to the Senate Subcommittee on Patents, Copyrights and Trademarks, Committee on the Judiciary, from: Page
Society of Illustrators, New York, NY (with enclosures), September 10, 1989 ... 706
Computer and Business Equipment Manufacturers Association (CBEMA), Washington, DC, September 20, 1989 ... 712
American Association of Advertising Agencies, Washington, DC, October 3, 1989 ... 723
Time Inc. Magazines, New York, NY, October 12, 1989 ... 728
Department for Professional Employees, AFL-CIO, Washington, DC, October 13, 1989 ... 732
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Washington, DC, October 16, 1989 ... 734
Houghton Mifflin Company, Boston, MA (with exhibits), October 13, 1989 ... 735

TUESDAY, OCTOBER 24, 1989

Ralph Oman, Register of Copyrights, accompanied by Dorothy Schrader, general counsel; Eric Schwartz and William Patry, Policy Planning Advisors ... 762
Peter Nolan, vice president and counsel, the Walt Disney Co., representing the Motion Picture Association of America ... 1035
J. Nicholas Counter III, president, Alliance of Motion Picture and Television Producers ... 1065
Milos Forman, motion picture director, representing the Directors Guild of America ... 1090
George Stevens, Jr., filmmaker, John F. Kennedy Center for the Performing Arts ... 1105
Glenn Gumpel, national executive director, Directors Guild of America ... 1117
Roger L. Mayer, president, Turner Entertainment Co ... 1150
David W. Fleming, general counsel, American Society of Cinematographers, accompanied by Stanley Cortez, cinematographer ... 1181
Jonathan H. Klein, vice president and general manager, WJZ-TV, channel 13, Baltimore, MD, representing the National Association of Broadcasters and the Association of Independent Television Stations, Inc ... 1207
Jan DeMasse, president, Video Place, representing the Video Software Dealers Association, accompanied by Bert Wides, counsel, law firm of Arent, Fox ... 1223

ADDITIONAL SUBMISSIONS FOR THE RECORD

Letters to the Subcommittee on Patents, Copyrights and Trademarks, Senate Committee on the Judiciary, from:
Producers Guild of America, Inc., Beverly Hills, CA, October 26, 1989 ... 1248
International Photographers Guild, Hollywood, CA, October 30, 1989 ... 1262
Bob Collins Cinematography, Venice Beach, CA, November 21, 1989 ... 1265

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Brown, Jack E.:
Testimony ... 54
Prepared statement ... 56
Responses to followup questions submitted by:
Senator DeConcini ... 68
Senator Leahy ... 72
Cawley, Linda:
Testimony on behalf of Peter Karlen ... 87
Responses to followup questions submitted by Senator Leahy ... 119
Clancy, Tom:
Testimony ... 533
Responses to followup questions submitted by Senator DeConcini ... 564
Cochran, Hon. Thad:
Testimony ... 196
Prepared statement ... 198
Counter, J. Nicholas, III:
Testimony ... 1065
Prepared statement ... 1067

Page

Counter, J. Nicholas, III—Continued
Responses to followup questions submitted by Senator DeConcini 1082
Damich, Edward:
Testimony 26
Prepared statement 27
Responses to followup questions submitted by Senator DeConcini 40
DeConcini, Hon. Dennis:
Statement of Hon. Edward J. Markey, a Representative in Congress from the State of Massachusetts 24
DeMasse, Jan:
Testimony 1223
Prepared statement 1225
Responses to followup questions submitted by Senator DeConcini 1244
Fishman, R. Jack:
Testimony 678
Prepared statement on behalf of the National Newspaper Association 680
"An Overview of the Moral Right," memorandum prepared by Robert J. Brinkmann, general counsel, National Newspaper Association 690
Summary of testimony 700
Forman, Milos:
Testimony 1090
Prepared statement 1093
Letter to Senator DeConcini, November 27, 1989 1128
Responses to followup questions submitted by Senator Grassley 1129
Fleming, David W.:
Testimony 1181
Prepared statement 1184
Attachments:
A partial list of prominent motion pictures photographed by A.S.C. members 1194
"He Is A True Artist," article, Third Annual ASC Awards 1202
Prepared statement of Stanley Cortez, A.S.C., past president of the American Society of Cinematographers 1203
Responses to followup questions submitted by Senator DeConcini 1236
Gorman, Robert:
Testimony 44
Prepared statement 46
Gumpel, Glenn:
Testimony 1117
Prepared statement 1119
Responses to followup questions submitted by:
Senator Grassley 1135
Senator Leahy 1138
Senator DeConcini 1139
Hatch, Hon. Orrin G.:
Letter from Rosenberg & Stiebel, New York, NY, June 19, 1989 21
Karlen, Peter H.:
Prepared statement 90
Responses to followup questions submitted by:
Senator DeConcini 111
Senator Leahy 119
Kennedy, Hon. Edward:
Comparison of Artists Rights Bills, fact sheet 18
Klein, Jonathan H.:
Testimony 1207
Prepared statement 1210
Responses to followup questions submitted by Senator DeConcini 1237
Klipper, Michael R.:
Testimony 566
Prepared statement of the Committee for America's Copyright Community 568
Attachment A: List of members of the Committee for America's Copyright Community 609
Supplemental statement of the Committee for America's Copyright Community 610

Page

Klipper, Michael R.—Continued
Responses to followup questions submitted by:
Senator DeConcini ... 627
Senator Leahy ... 638
Kovner, Victor:
Testimony ... 641
Prepared statement ... 643
Letter to Senator DeConcini, November 30, 1989 ... 656
Maisel, Jay:
Testimony ... 513
Prepared statement ... 515
Responses to followup questions submitted by Senator DeConcini ... 541
Additional response to questions raised at hearing ... 555
Attachments: Work for hire contracts ... 558
Martin, Don:
Testimony ... 524
Prepared statement ... 526
Responses to followup questions submitted by:
Senator DeConcini ... 541
Senator Leahy ... 551
Additional response to questions raised at hearing ... 555
Attachments: Work for hire contracts ... 558
Mayer, Roger L.:
Testimony ... 1150
Prepared statement ... 1153
Attachments:
Appeal Against the Judgment of the Tribunal de Grande Instance de Paris, decision by the Court of Appeals of Paris, July 6, 1989 ... 1164
"Italo Court Bars TV Blurbs In Pic," article from Variety, October 18, 1989 ... 1179
Responses to followup questions submitted by:
Senator Leahy ... 1233
Senator DeConcini ... 1234
Nolan, Peter:
Testimony ... 1035
Prepared statement ... 1038
Responses to followup questions submitted by Senator DeConcini ... 1082
Oman, Ralph:
Testimony ... 203, 762
Prepared statements ... 206, 993
Responses to followup questions submitted by:
Senator DeConcini ... 228, 1020
Senator Leahy ... 235, 1028
Senator Grassley ... 1026
Senator Simpson ... 1029
"Technological Alterations to Motion Pictures and Other Audiovisual Works: Implications for Creators, Copyright Owners, and Consumers," a report of the Register of Copyrights, U.S. Copyright Office, Washington, DC, March 1989 ... 764
Attachments:
Letter from Representatives Robert W. Kastenmeier and Carlos Moorhead, Subcommittee on Courts, Civil Liberties and the Administration of Justice, February 25, 1988 ... 963
Various announcements from the Copyright Office, Library of Congress, Washington, DC:
Notice of Inquiry ... 965
Notice of Registration Decision ... 967
Notice of Proposed Rulemaking ... 970
Request for Information; Notice of Hearing ... 972
Final Regulation ... 974
"The Financing of Motion Pictures," prepared by Eric Schwartz, Policy Planning Advisor to the Register of Copyrights ... 978
Stevens, George, Jr.:
Testimony ... 1105
Prepared statement ... 1108
Van Sant, Tom:
Testimony ... 121

Page

Van Sant, Tom—Continued
Prepared statement 124
Responses to followup questions submitted by Senator DeConcini 129
Veliotes, Nicholas A.:
Testimony 658
Prepared statement 659
Weisgrau, Richard:
Testimony 237
Prepared statement 241
Additional statement for the record 249
Attachment A: List of the Copyright Justice Coalition 333
Attachment B: Statements in support of S. 1253 336
Attachment C: "245 Reasons Not To Work For Hire," PDN editorial from the Photo District News, September 1988 368
Attachment D: Various agreements and forms 371
Attachment E: List of members of the Computer and Business Equipment Manufacturers Association 414
Attachment F: Special Edition of the Graphics Artists Guild, fall 1987 435
Additional statements for the record from:
The Graphic Artists Guild, Inc., New York, NY (with attachments) 451
The Authors Guild, Inc 479
The National Writers Union, New York, NY 484
Additional comments on work for hire, with examples of work made for hire contracts 487
The Songwriters Guild of America 497
Popular songwriters contract 509
Responses to followup questions submitted by:
Senator DeConcini 541
Senator Leahy 551
Additional response to questions raised at hearing 555
Attachments: Work for hire contracts 558
Wilson, Marc F.:
Testimony 131
Prepared statement 133
Responses to followup questions submitted by Senator DeConcini 135

COPYRIGHT MORAL RIGHTS: VISUAL ARTISTS RIGHTS ACT (S. 1198) AND MORAL RIGHTS IN OTHER STILL VISUAL ART FORMS

TUESDAY, JUNE 20, 1989

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS,
Washington, DC.

The committee met, pursuant to notice, at 10:30 a.m., in room 226, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the subcommittee) presiding.

Also present: Senators Kennedy, Hatch, and Grassley.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. The Subcommittee on Patents, Copyrights and Trademarks begins this morning a series of hearings on moral rights in the copyright law. The term "moral rights" refers to those inherent rights of artists, authors, and other creators of copyrighted works that exist simply because the individual created the work. The individuals who have moral rights in these works are not necessarily the copyright holders and may not even be in possession of the copyrighted work.

Last year we were faced with several different proposals to create moral rights for artists. Senator Kennedy introduced legislation that ultimately was reported by this subcommittee and by the full committee that was similar to the legislation we will consider later today. Congressman Mrazek and Congressman Yates proposed an amendment to the Interior appropriations bill that would have created a right of film directors and screenwriters to object to alteration of some films. On a related issue, Senator Cochran discussed offering his copyright work for hire legislation as an amendment to the Berne Convention implementing legislation.

I reluctantly opposed all of these efforts last year, not because I was opposed to moral rights or to an adjustment in the work for hire doctrine, but because I believed that we in Congress should examine these issues in a thorough and comprehensive way. In opposing those efforts last year I promised that I would undertake such a thorough and comprehensive review in the first session of the 101st Congress. Today we begin that review.

I think that it is important that, if moral rights are to be incorporated in the copyright law, they not be implemented piecemeal but rather in a coherent and logical way, if possible. If Congress

decides that moral rights are a desirable and appropriate addition to the copyright law, it is important that they are integrated in a manner that ensures that the rights of copyright holders, artists, and users of copyright material are all protected.

The copyright law has always represented a balance among the interests of all these parties. Congress from time to time is called upon to address perceived imbalances in the copyright law that favor the interests of one party over another. I believe it is our responsibility to monitor this balance as technology advances and as economic conditions change and, if such imbalances occur, to attempt to correct them. But I also believe it is incumbent on those advocating change in the copyright law to show that such change is necessary and that by correcting one problem we are not creating many others.

I look forward to the testimony presented today as well as the testimony we will receive on July 20 and August 3, when we will have subsequent hearings. I am interested in the subject of moral rights and believe that it is a subject that deserves our attention. I am unsure in my own mind as to how we should change it, but I am as interested as anybody in the process of the hearings today, to attempt to get both sides of the issue so that we might make judgments based on merit and not just one economic force over another, or one emotional force over another. I am undecided on these important questions and am hopeful that these hearings will help resolve some of the problems in my mind.

[A copy of S. 1198 follows:]

II

101ST CONGRESS
1ST SESSION

S. 1198

To amend title 17, United States Code, to provide certain rights of attribution and integrity to authors of works of visual art.

IN THE SENATE OF THE UNITED STATES

JUNE 16 (legislative day, JANUARY 3), 1989

Mr. KENNEDY (for himself and Mr. KASTEN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 17, United States Code, to provide certain rights of attribution and integrity to authors of works of visual art.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Visual Artists Rights Act of 1989".

SEC. 2. WORK OF VISUAL ART DEFINED.

Section 101 of title 17, United States Code, is amended by inserting after the paragraph defining "widow" the following:

"A 'work of visual art' is a painting, drawing, print, sculpture, or still photographic image produced for exhibition purposes only, existing in a single copy, in a limited edition of 200 copies or fewer, or, in the case of a sculpture, in multiple cast sculptures of 200 or fewer. A work of visual art does not include—

"(1) any version that has been reproduced in other than such limited edition prints or cast sculptures;

"(2)(A) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio visual work, book, magazine, periodical, or similar publication;

"(B) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

"(C) any portion or part of any item described in subparagraph (A) or (B);

"(3) any work made for hire;

"(4) any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in paragraph (1), (2), or (3); or

"(5) any work not subject to copyright protection under section 102 of this title.".

SEC. 3. RIGHTS OF ATTRIBUTION AND INTEGRITY.

(a) RIGHTS OF ATTRIBUTION AND INTEGRITY.—Chapter 1 of title 17, United States Code, is amended by inserting after section 106 the following new section:

"§ 106A. Rights of certain authors to attribution and integrity

"(a) RIGHTS OF ATTRIBUTION AND INTEGRITY.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

"(1) shall have the right—

"(A) to claim authorship of that work, and

"(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

"(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work as described in paragraph (3); and

"(3) subject to the limitations set forth in section 113(d), shall have the right—

"(A) to prevent any distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional or grossly negligent distortion, mutilation, or modification of that work is a violation of that right, and

"(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

In determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, conservators of recognized stature, and other persons involved with the creation, appreciation, history, or marketing of works of recognized stature. Evidence of commercial exploitation of a work as a whole, or of particular copies, does not preclude a finding that the work is a work of recognized stature.

"(b) SCOPE AND EXERCISE OF RIGHTS.—The author of a work of visual art has the rights conferred by subsection (a), whether or not the author is the copyright owner, and whether or not the work qualifies for protection under section 104. Where the author is not the copyright owner, only the author shall have the right during his or her lifetime to exercise the rights set forth in subsection (a).

"(c) EXCEPTIONS.—(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a destruction, distortion, mutilation, or other modification described in subsection

(a)(3) unless the modification was the result of gross negligence in maintaining or protecting the work.

"(2) The modification of a work of visual art which is the result of conservation is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

"(d) DURATION OF RIGHTS.—(1) With respect to works of visual art created on or after the effective date set forth in section 10(a) of the Visual Artists Rights Act of 1989, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author and fifty years after the author's death.

"(2) With respect to works of visual art created before the effective date set forth in section 10(a) of the Visual Artists Rights Act of 1989, but not published before such effective date, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

"(3) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

"(e) TRANSFER AND WAIVER.—(1) Except as provided in paragraph (2), the rights conferred by subsection (a) may not be waived or otherwise transferred.

"(2) After the death of an author, the rights conferred by subsection (a) on the author may be exercised by the person to whom such rights pass by bequest of the author or by the applicable laws of intestate succession.

"(3) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any fixation of that work, or of a copyright or any exclusive right under a copyright in that work.".

(b) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 1 of title 17, United States Code, is amended by inserting after the item relating to section 106 the following new item:

"106A. Rights of certain authors to attribution and integrity.".

SEC. 4. REMOVAL OF WORKS OF VISUAL ART FROM BUILDINGS.

Section 113 of title 17, United States Code, is amended by adding at the end thereof the following:

"(d)(1)(A) Where—

"(i) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and

"(ii) the author or, if the author is deceased, the person described in section 106A(e)(2), consented to the installation of the work in the building in a written

instrument signed by the owner of the building and the author or such person,

then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply, except as may otherwise be agreed in a written instrument signed by such owner and the author or such person.

"(B) An agreement described in subparagraph (A) that the rights conferred by paragraphs (2) and (3) of section 106A(a) shall apply shall not be binding on any subsequent owner of the building except where such subsequent owner had actual notice of the agreement or where the instrument evidencing the agreement was properly recorded, before the transfer of the building to the subsequent owner, in the applicable State real property registry for such building.

"(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless—

"(A) the owner has made a diligent, good faith attempt without success to notify the author or, if the author is deceased, the person described in section 106A(e)(2), of the owner's intended action affecting the work of visual art, or

"(B) the owner did provide such notice by registered mail and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

If the work is removed at the expense of the author or the person described in section 106A(e)(2), title to that fixation of the work shall be deemed to be in the author or such person, as the case may be. For purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the last known address of the author or, if the author is deceased, to the person described in section 106A(e)(2).

"(3) The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building, or persons described in section 106A(e)(2) with respect to that work, may record their identities and addresses with the Copyright Office. The Register shall also establish procedures under which such authors or persons may update the information so recorded, and procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection.".

SEC. 5. PREEMPTION.

Section 301 of title 17, United States Code, is amended by adding at the end the following:

"(f)(1) On or after the effective date set forth in section 10(a) of the Visual Artists Rights Act of 1989, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

"(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

"(A) any cause of action from undertakings commenced before the effective date set forth in section 10(a) of the Visual Artists Rights Act of 1989; or

"(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art.".

SEC. 6. INFRINGEMENT ACTIONS.

(a) IN GENERAL.—Section 501(a) of title 17, United States Code, is amended—

(1) by inserting after "118"; the following: "or of the author as provided in section 106A(a)"; and

(2) by striking out "copyright." and inserting in lieu thereof "copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a).".

(b) EXCLUSION OF CRIMINAL PENALTIES.—Section 506 of title 17, United States Code, is amended by adding at the end thereof the following:

"(f) RIGHTS OF ATTRIBUTION AND INTEGRITY.—Nothing in this section applies to infringement of the rights conferred by section 106A(a).".

(c) REGISTRATION NOT A PREREQUISITE TO CERTAIN REMEDIES.—(1) Section 411(a) of title 17, United States Code, is amended in the first sentence by inserting after "United States" the following: "and an action brought for a violation of the rights of the author under section 106A(a)".

(2) Section 412 of title 17, United States Code, is amended by inserting "an action brought for a violation of the rights of the author under section 106A(a) or" after "other than".

SEC. 7. STATUTE OF LIMITATIONS.

Section 507(b) of title 17, United States Code, is amended by adding at the end the following: "For purposes of an action brought for infringement of the rights under section 106A(a) of an author of a work of visual art, the claim accrues when the author (or person described in section 106A(e)(2), as the case may be) knew or should have known of the violation of the author's rights under section 106A(a).".

SEC. 8. FAIR USE.

Section 107 of title 17, United States Code, is amended by striking out "section 106" and inserting in lieu thereof "sections 106 and 106A".

SEC. 9. STUDY ON RESALE ROYALTIES.

(a) IN GENERAL.—The Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, shall conduct a study on the feasibility of implementing—

(1) a requirement that, after the first sale of a work of art, a royalty on any resale of the work, consisting of a percentage of the price, be paid to the author of the work; and

(2) other possible requirements that would achieve the objective of allowing an author of a work of art to share monetarily in the enhanced value of that work.

(b) GROUPS TO BE CONSULTED.—The study under subsection (a) shall be conducted in consultation with other appropriate departments and agencies of the United States, foreign governments, and groups involved in the creation, exhibition, dissemination, and preservation of works of art, including artists, art dealers, collectors of fine art, and curators of art museums.

(c) REPORT TO CONGRESS.—Not later than 18 months after the date of the enactment of this Act, the Register of Copyrights shall submit to the Congress a report containing the results of the study conducted under this section, and any recommendations that the Register may have as a result of the study.

SEC. 10. EFFECTIVE DATE.

(a) IN GENERAL.—Subject to subsection (b) and except as provided in subsection (c), this Act and the amendments made by this Act take effect 6 months after the date of the enactment of this Act.

(b) APPLICABILITY.—The rights created by section 106A of title 17, United States Code, shall apply to works created but not published before the effective date set forth in subsection (a), and to works created on or after such effective date, but shall not apply to any destruction, distortion, mutilation, or other modification (as described in section

106A(a)(3) of such title) of any work which occurred before such effective date.

(c) SECTION 9.—Section 9 takes effect on the date of the enactment of this Act.

○

I want to yield to the Senator from Massachusetts and to tell him that I regret not being able to facilitate his request last year in passing his bill. And I assure him that I am going to proceed with the hearings and certainly give him a markup in the committee regardless of what my feelings are because I know of his deep interest in this subject matter. He has been very patient in going along with the extended hearings.

Senator Kennedy.

OPENING STATMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. I want to thank you, Mr. Chairman, for having these hearings and for your continued work on these important issues. The discussion of moral rights has expanded and evolved since we first initiated this proposal. I know there are many additional aspects of this concept besides that which we will comment on today. I know you are focusing on those features, also. It is a complex and difficult issue. I appreciate your opening statement. Hopefully, as you consider the wide range of implications on the whole issue of moral rights, you will also understand what we are attempting to achieve with S. 1198. Hopefully, we will be able to win your support for this particular piece of legislation.

I introduced S. 1198 because I believe that the legitimate needs of artists to protect the integrity of their work is entirely compatible with the public interest. The status quo is not good enough, and we must act.

The legislation which I have introduced establishes the rights of attribution and integrity. It requires that a creator's name accompany a work of art, and also permits an artist to disclaim authorship of his work if it is altered or distorted.

In addition to protecting the authorship rights of creative artists, the bill also protects the integrity of works of fine art. The intentional and negligent mutilation or destruction of a work of visual art is prohibited under the bill and would be subject to copyright infringement, with the exception of criminal penalties.

This is the third hearing the subcommittee has held to consider this issue. I am pleased with the record that the committee has established on the issue and the compelling case that witnesses have made over the last several years regarding the injuries artists suffer on a regular basis, along with their absolute lack of any remedial or injunctive relief from these injuries.

How can we continue to fail these individuals who contribute so enormously and eloquently to our national heritage?

In the course of these committee hearings I have often spoken of the uniqueness of the visual arts as a medium of expression and how a painter's work is clearly his or her own individual expression. I know that the committee will address copyright needs of other disciplines in the weeks ahead, but I do believe that the visual arts are different. They are unique works and the result of a single creative vision.

This bill addresses a narrow and specific problem, the mutilation and destruction of works of fine art which are often one-of-a-kind and irreplaceable. Over the past two Congresses I have worked

with the copyright community to craft a precise bill that does not inadvertently affect other copyrighted works. I look forward to speedy approval of the bill by the committee and the full Senate without changes that would upset this delicate balance.

I welcome this hearing today. We will hear from several expert witnesses who have varying perspectives and views on the establishment of such rights for visual artists.

Michelangelo once said that his goal in sculpture was really very simple, to set free the images that he could see imprisoned in the stone. The visual artist bill seeks to protect the fundamental freedom of expression that Michelangelo described. We have come a long way with this bill, made many compromises and technical improvements in it, and now look forward to completing the task.

Thank you again, Senator, for your responsiveness in calling this hearing, and I look forward to the testimony of the witnesses.

I have a brief fact sheet on the visual artist bill which I would like to have included in the record.

Senator DECONCINI. Without objection, it will appear in the record.

[The fact sheet furnished by Senator Kennedy follows:]

COMPARISON OF ARTISTS RIGHTS BILLS

	S.1198 (101st Congress)	S.1619 (100th Congress	Kastenmeier
protected works	paintings, sculptures, drawings, fine art photos, limited edition	paintings, sculptures, drawings, limited edition prints that are publicly displayed	same as S.1198
actions prohibited	mutilation of any protected work that harms honor or reputation; destruction of any protected work of recognized stature	mutilation of any protected work; destruction of any protected work of recognized stature	mutilation or destructin of any protected work that harms honor or reputation with presumption that mutilation or destruction of work of recognized stature harms honor or reputation
art on buildings	artists must get signed agreement preserving rights	same as S.1198	same as S.1198
duration of right	life of artist plus 50 years, or duration of copyright	life of artist plus 50 years	same as S.1198
remedies	injunctive damages, but no criminal penalties	same as S.1198	same as S.1198
preemption of state laws	yes	yes	yes

Senator DECONCINI. Thank you, Senator Kennedy.

I now welcome my ranking member on the committee, Senator Hatch, who has been a leader in the area of copyrights, trademarks, and patents. I yield to him for any opening statement that he may have.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Senator DeConcini. I want to compliment you for holding this hearing today.

I believe that the principal purpose of the copyright law should be to secure and maintain the rights of those who create works of art, not those who would seek to profit from the efforts of those creative artists. When the copyright law succeeds in this goal, we all benefit, as artists are then given the necessary incentive and freedom to create these great works of art which enhance all of our lives.

Therefore I am glad to have the opportunity which today's hearing presents to hear from artists and others active in the arts as to how the copyright act can be amended to best serve our Nation's visual artists.

I am interested in fashioning a copyright law that will stimulate and encourage artists and creative people. Unfortunately, many who have raised questions about this bill and its predecessors or who question the entire concept of so-called moral rights for artists are sometimes accused of being insensitive to the interests of visual artists. Nothing could be further from the truth. The questions that have been raised about this bill and about other forms of moral rights legislation are based on very real concerns that such legislation might depress the healthy American art market and might dry up available commercial opportunities for young contemporary artists.

By any measure, the current American art market favors the interests of contemporary artists more than do the markets of any other country, particularly those European nations which have most fully embraced the concept of noneconomic moral rights. The general art market in this country is undeniably healthy; for established artists, the market is truly booming. And I might add that it was the consensus opinion of the witnesses who testified on the predecessor to this bill that it is the established artists whose interests are most clearly favored by moral rights legislation.

I need to be convinced, first, of the need for this legislation, and second, of the efficacy of this bill to meet the needs of the visual artist community. I must also mention my concern about the imposition of moral rights concepts by Federal statute rather than through the bargaining of the parties to a transaction.

Unfortunately, the bill currently proposed, S. 1198, raises even more concerns than past bills on the subject, such as S. 1619, which was introduced in the 100th Congress. For instance, the earlier bill applied only to the publicly displayed works of art; S. 1198 applies, apparently, to all works of visual art wherever they are found. The right of integrity under the earlier bill prohibited substantial alterations or mutilations; S. 1198 covers any distortion, mutilation, or

other modification which would be prejudicial to the artist's honor or reputation. The rights provided under the former bill terminated on the death of the artist; under S. 1198, the rights will last another 50 years beyond the author's death. S. 1619 presumed that the right of integrity in a work of visual art incorporated in a building was waived unless expressly reserved by a recorded instrument. The present bill makes the opposite presumption, that such a work of art cannot be removed unless the author executed a written agreement consenting to its installation.

Finally, the bill relies on vague concepts, such as "work of recognized stature," which are open invitations to litigation. It serves no artist's interest to force him or her to go to court in order to prove the recognized stature of his or her work. Our Nation's judges are excellent interpreters of the law, but they have demonstrated time and time again that they are ill-equipped to make public policy, and I fear that they will be even more ill-equipped to make the aesthetic judgments which S. 1198 would ask of them and actually impose upon them.

So bearing these considerations in mind, I look forward to hearing today's witnesses and to looking at this matter as thoroughly and completely as we can, and I'll keep an open mind on every aspect of this bill and try to help you, Mr. Chairman, and others on this subcommittee and on the Judiciary Committee to do what is best in this area.

[A letter to Senator Hatch, submitted for the record, follows:]

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June 19, 1989

Senator Orrin G. Hatch
Russel Senate Office Building
Room 135
Washington D.C. 20510

RE: S1198 Visual Artists Rights Act of 1989
(with the request that the following be made part of the record of the hearing on this bill)

Dear Senator Hatch:

I am an art dealer, the fourth generation in my family firm. We have never dealt in contemporary art though we have had a private interest in the field.

The current bill sponsored by Senator Kennedy is, obviously, extremely well intentioned and everyone in the art world is interested in a better lot for artists. It is my opinion, however, that this bill, as written, would have a deleterious effect on the young artists it seeks to assist.

The right of an artist to disclaim authorship of a work of art whether or not he created it is extremely dangerous. Years ago our gallery handled a Picasso which the artist denied having created. His Paris dealer had to intervene to remind him that he had done it. This is not a unique event and art dealers, collectors and museums come across the problem all the time of the artist who does not remember or wish to remember his/her own work. What is even more dangerous is when the right of denying a work of art's authenticity is left to the family or heirs. In France it usually comes down to a question of a fee or commission being the basis of acceptance of a work of art. What the artist leaves to the world should not be his censored version nor that of his/her family.

What if the descendants of Michelangelo were not pleased with the controversial restoration of the Sistine Chapel in the Vatican?

Naturally, no one wants to see an art work cut in half and sold as two works of art. Even though today every major museum would be extremely grateful to be able to own even a fragment of a Michelangelo.

It seems that this bill also does not allow an artist to waive his right of copyright or allow the right of assignment. Happily there are collectors who buy art for the love of it with no thought of its future value. This was particularly true in the past before the monetarization of art. Today, however, with all the hype too many individuals are not art collectors but, they believe, art investors. As much as I deplore this personally, it does make for a larger market with far wider interest. If the press did not announce daily the record breaking sales at the auction houses, I doubt that this bill would ever have been proposed.

I do not believe that the individual or corporation that commissions a work of art for a building will do so if it does not have total control. The art investor will find it a total lack of incentive if he/she cannot do what he/she wishes with their building for which they were thinking of acquiring a mural or sculpture.

As we know most contemporary art never rises in value and the young artist needs every possible break and advantage. My specialty is French 18th century and the greatest collectors of that period not only collected old masters but were the patrons of the contemporary artists of their time. The patron buys and commissions works of art from the artist giving him/her both the financial and moral support that allows the artist to continue the creative process.

It does seem to me that this bill might have one effect that had not been originally thought of. As prices have mounted in the modern field we have seen collectors move to the old masters which also rise in value but at a less eccentric pace. With this bill making the acquisition of modern art more complicated we will probably see more collectors in our old masters field!

Though I realize that this bill has been introduced with all the best intentions I certainly hope it will be seriously reconsidered before being introduced to the full Senate.

Thanking you for giving me your kind attention in this matter.

Sincerely yours,

Gerald G. Stiebel
President

Senator DECONCINI. Thank you, Senator Hatch.

Our first witness this morning was going to be Congressman Edward Markey. He cannot be here because of conflicting schedules, but his statement will appear in the record as if he presented it.

[The prepared statement of Mr. Markey follows:]

Honorable Edward J. Markey
Statement before the Senate Subcommittee on Patents,
Copyrights, and Trademarks
June 20, 1989

Thank you, Mr. Chairman, and members of the Subcommittee, for providing me the opportunity to testify here today. I have joined with my colleague, the Honorable Robert Kastenmeier, in introducing legislation which is similar to that introduced by Senator's Kennedy and Kasten. That legislation seeks to provide needed protection for visual artists.

S. 1198, like the House bill, would provide American artists with the copyright protection they deserve. Artists in this country play a very important role in capturing the essence of our culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly.

It is paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist. John Ruskin, a famous historian and philosopher once said, "All great art is the work of the whole living creature, body and soul, and chiefly of the soul."

It's important to realize the vulnerability of an artist who has just completed a work. I'll tell you one Boston artist's story. Unlike and author with a good concept, she has not received an advance from a potential patron to pay for easels, paint, and studio space during the production of the work. And, like most artists in this country, she has to hold down another job to support herself. Imagine her horror when she sees her own abstract oil painting reproduced on an album cover as she walks by a downtown record store!

Under a Massachusetts arts protection law, she has the power to bring a suit, but in any state where there is no statute protecting visual works from this type of abuse, she would be absolutely out of luck. Currently, there are nine states which offer protections for works of art. If she were an author or a songwriter on the other hand, federal copyright laws would protect her work from being commercially exploited without crediting her as the author.

Our legislation would provide visual artists with protection for their works which has been sorely lacking in U.S. copyright law. Unlike the works of literary or performing artists, artworks created by visual artists are treated more as physical objects than as expressions of the artistic creativity of their authors.

The bill would recognize the artist's interest in maintaining the integrity of his or her work. The artist would be given the right to claim authorship of his or her work, to disclaim

authorship of a distorted or mutilated work, and to bring a civil copyright claim for willful destruction or mutilation of his or her work.

I would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered. While we are sensitive to the concerns of those industries that wish to maintain their rights of editing and reproduction, I must take this opportunity to emphasize that this legislation covers only a very select group of artists whose works have been allowed to fall through the existing gaps in our copyright law.

I would also like to point out that the law would be applicable only to works created on or after the effective date of the act, or to works created but not published before the effective date. In this way, we avoid diminishing the value of works of art which a person has already purchased.

Finally, we have included in both our bills a provision calling for a study on the feasibility of implementing a resale royalty for certain works of art as well as other possible means of promoting opportunities for artists to share in some of the wealth as the value of that work increases. If we are to be serious about promoting art in this country, we need to recognize that with all the money being made in the art world, very little of it gets back to the artist. Once again, it is a question of acknowledging the lasting relationship between the artist and his or her creation. This relationship is not severed the first time the work is sold.

For instance, I probably don't have to remind everyone of the atrocity which occurred with Picasso's "Trois Femmes" when two Australian entreprenuers chopped up that great masterpiece into 500 "original Picasso pieces." The absence of legal protection for the artist paved the way for this great work to be brutally mutilated and then allowed Picasso's name to be exploited for the financial gain of the two profiteers.

I believe that the Visual Artists' Rights Act would encourage and promote the arts in our society. American culture thrives on the artistic expression of talented individuals, and American artists deserve no less than the protections offered in this legislation.

I want to commend you for addressing this issue today. The House plans to hold a similar hearing later this summer, and we hope the legislation will move quickly. Thank you.

Senator DECONCINI. We will now move to the first panel. If they would come forward, please: Mr. Edward Damich, professor of law, George Mason University; Mr. Robert Gorman, Kenneth W. Gemmill Professor of Law at the University of Pennsylvania; and Mr. Jack Brown, a distinguished lawyer from Phoenix in the law firm of Brown & Bain.

Mr. Damich, we will begin with you, sir. If you would summarize your statement in 5 minutes so that we may have time to entertain some questions, your full statement will appear in the record.

STATEMENT OF EDWARD DAMICH, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY LAW SCHOOL, ARLINGTON, VA

Mr. DAMICH. Mr. Chairman, members of the committee, my name is Edward Damich. I am associate professor of law at George Mason University School of Law in Arlington, VA.

Before I begin my remarks I would like to express my thanks for this opportunity to appear before you today. The views that I express are my own; I am not acting as a paid advocate of any group.

I would also like to express my appreciation for the work that Senator Kennedy and his staff have done on behalf of national protection of the moral rights of authors. The subcommittee also is to be commended for recognizing the importance of this issue.

My oral testimony will be brief, but I would like my longer written testimony to be included in the record.

Senator DECONCINI. It will so be ordered.

Mr. DAMICH. Thank you, Senator.

In my oral testimony I would like to make a few basic points.

There is a need for Federal legislation to protect the integrity of works of visual arts and to protect the right of the artist to be identified or not as the author of the work. Examples of indifference to objects as works of art are not hard to come by. The experience of Tom Van Sant will be related shortly.

The doctrine of the moral rights of authors is tailor-made to achieve this protection and it can serve as a frame of reference to test whether protection is adequate.

Moral rights derive from the theory that a work of art expresses the personality of its author; thus, the artist has the right to be identified as the personality expressed and to ensure that his personality is accurately expressed. This is a concept that American law has already accepted to some degree, as in the right to privacy, and it is a concept that the United States has accepted by signing the Berne Convention.

Protection of moral rights is especially urgent in the case of one-of-a-kind works of visual art where alterations can lead to total loss of the authenticity of the work.

Although there are areas of the Kennedy bill that have room for improvement in my view, in general it is a commendable basis for protection of the rights of visual artists.

Thank you.

[The prepared statement of Mr. Damich and responses to additional questions follow:]

Statement of Edward J. Damich
Associate Professor of Law, George Mason University

Submitted to
the Subcommittee on Patents, Copyrights, and Trademarks
of the Committee on the Judiciary
United States Senate

on the Visual Artists Rights Act of 1989 (S. 1198)

June 20, 1989

SUMMARY

Federal moral rights protection is necessary in order to preserve the authenticity of the author's communication of his artistic vision to the public and to ensure that his vision will be identified as his. Federal moral rights protection is also necessary in order to fulfill the United States' obligations under the Berne Convention, which in article 6bis, contains a comprehensive moral rights provision. Although nine states have recognized moral rights to some systematic degree, there is no moral rights protection to speak of in the other states, and some of the state statutes do not provide comprehensive protection and they do not measure up to the requirements of Berne. Furthermore, they are constantly in danger of being preempted.

Despite the fact that there is little basis for concluding that moral rights protection exists in the United States, the principle on which it is based, viz., the protection of the personality, is well established in American law. The torts of violation of the right of privacy and defamation per se are examples of causes of action that protect the plaintiff's interest in his "honor," an aspect of the right of personality. Thus, federal legislation to protect moral rights would not introduce a totally foreign concept.

Since there is nothing wrong in principle with achieving comprehensive moral rights protection incrementally, The Visual Artists Rights Act of 1989, S. 1198 (hereinafter Kennedy bill), is not objectionable for restricting protection to works of visual art. Its preemption provision, however, raises a serious concern in that more comprehensive state protection might be lost. Furthermore, although in general the Kennedy bill represents a viable scheme for protection of visual artists, it can be criticized for: (1) the exclusion of photographs of a limited edition of 200 or fewer; (2) the limitation of protection of the fidelity of reproductions to limited editions of 200 or fewer; (3) the seemingly knee-jerk exclusion of works made for hire; (4) the limitation of the right against destruction to works "of recognized stature;" (5) the exclusion of anonymity and pseudonymity from the right of attribution; and (6) the "bad fit" that results from applying the Copyright Act provisions for monetary damages to moral rights violations.

Mr. Chairman, members of the subcommittee, my name is Edward Damich. I am Associate Professor of Law at George Mason University School of Law, Arlington, Virginia. Before I begin my remarks I would like to express my thanks for this opportunity to appear before you today. The views that I express are my own; I am not acting as a paid advocate of any group.

I would also like to express my appreciation for the work that Senator Kennedy and his staff have done on behalf of national protection of the moral rights of authors. The subcommittee also is to be commended for recognizing the importance of this issue.

My testimony consists of three parts. In the first part, I identify the reasons for federal legislation to protect the moral rights of authors. In the second part, I relate the concept of moral rights to well-established concepts that already exist in American law. In the third part, I comment on the provisions of the Kennedy bill.

I. The Basis For Federal Protection Of the Moral Rights of Visual Artists

Federal protection of the moral rights of visual artists is based on the recognition that works of visual art communicate an aspect of the artist's personality, viz., his creative vision. Just as a U.S. Senator might be at great pains to make sure that his remarks are accurately reported, so the visual artist feels that he is entitled to preserve the authenticity of his visual message. This personal aspect helps to define a work of art. The shock and horror that seems so natural over the repainting and stabilizing of a Calder mobile or the destruction of Tom Van Sant's mural are entirely out of place over the changing of a light fixture or the repainting of a wall. The negative reaction is prompted by indifference to the object as a work of art. The recognition of moral rights compels the owner of a material object to recognize that what he owns is a work of art, the communication of a unique personality.

Society also benefits from the protection of the artist's moral rights. If the arts are promoted by giving authors economic rights in their works, surely they are also promoted when authors are assured that their work will not be tampered with. As Judge Lumbard stated in Gilliam v. ABC,[1] "[T]he economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law, cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent." Furthermore, moral rights will help protect our cultural heritage.

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[1]538F.2d 14, 24 (2d Cir. 1976).

In addition to protecting the personal aspect of artistic creation, federal protection of moral rights can be based on our obligations under the Berne Convention for the Protection of Literary and Artistic Works which the United States adhered to March 1, 1989. Article 6bis of the Berne Convention provides for moral rights,[2] and no amount of qualifying language[3] can obscure the fact that this country has recognized moral rights in principle. Other common law countries have moved to fulfill their treaty obligations. The United Kingdom recently enacted comprehensive moral rights legislation[4] in order to comply with the requirements of article 6bis.

Ideally, the goal of federal protection of moral rights should be comprehensive protection of the creative personality. Minimally, the United States should comply with the language of article 6bis.

II. Moral Rights And the Right of Personality

Protecting the moral rights of authors is not transplanting a foreign organ into the body of American law. It may be a transplant, but there is every reason to believe that it will not be rejected, because American law contains similar genes.

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[2]"Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) (1978) [hereinafter WIPO Guide].

[3]"The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law--(1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in raltion to, the work, that would prejudice the author's honor or reputation." § 3 Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

[4]Copyright, Designs and Patents Act, 1988, ch. 48 [hereinafter British Act].

> The personal aspect of artistic creativity has been expressly recognized in American law. In Bleistein v. Donaldson Lithographing Co., Justice Holmes stated:
> The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible.[5]

More recently, the U.S. Supreme Court in Harper & Row Publishers v. Nation Enters. noted that the right of first publication in the Copyright Act (secs. 106(1) and (3)) had both a personal and an economic aspect.[6] When Nation magazine published excerpts of President Ford's autobiography before the book itself was published, the author was deprived not only of the economic advantage of first publication but also of his personal interest in creative control, i.e. the form, the time, and the circumstances of his communication of his personality to the public. These interests, the Court held, give the right of first publication a particular resistance to the claims of fair use.[7]

The phrase "honor or reputation," found in both article 6bis of the Berne Convention and in the Kennedy bill also suggests an American connection to moral rights. "Reputation" is familiar enough, but protection of "honor" in American law has not been fully appreciated. The right of privacy, for example, is primarily concerned with injury to "honor." The right of privacy, like moral rights, did not exist as a recognized cause of action until the beginning of this century, but it is now commonplace. The first step in the recognition of a cause of action for violation of the right of privacy was the identification of the interest to be protected. This was done in the famous article, "The Right of Privacy," by Samuel Warren and Louis Brandeis.[8] In order to convince the sceptical jurists of their day, Warren and Brandeis had to do more than merely argue that it would be "nice" to have certain aspects of one's life kept from public knowledge. What they had to do, and what they did do, was to show how necessary it was for the fluorishing of the human personality to have a zone in which experiments could be tried and in which mistakes could be made in fashioning one's individuality. Thus, Warren and Brandeis

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[5]188 U.S. 239, 250 (1903).

[6]"The author's control of first public distribution implicates not only his personal interest in creative control but also his property interest in exploitation of prepublication rights...." 471 U.S. 539, 555 (1985).

[7]Id.

[8]4 Harv. L. Rev. 193 (1890).

wrote that the right of privacy was based on the principle of "inviolate personality"[9] and that it was "part of the more general right to the immunity of the person,--the right to one's personality."[10] The right of privacy is not concerned with whether people think less or better of the person after facets of his personality are revealed to the public. The injury is to the dignity and the autonomy of the individual. Every private person should have the right to reveal his personality when he chooses, to the extent he chooses, and under circumstances that he chooses.

The parallel with moral rights is obvious, so obvious that it is not surprising that Warren and Brandeis used a common law copyright case, Prince Albert v. Strange,[11] as an example of a cause of action that protected the autonomy of the individual as well as the profit motive.[12] The artistically creative act is a communication to the public of the personality of the artist. Not only should she have the right to control the time, manner, and circumstances of this communication, but also, since it is a continuing communication, the artist has a right that it be authentic and that it be identified as her communication. Distorting this communication may cause people to think less of the artist, but even if they think better of her, the artist has sustained an injury to her personality. No matter what the reaction of the public to the revelation, the artist suffers the indignity of saying what she did not intend to say. The feeling that prompts the rebuke: "Don't put words in my mouth" comes close to capturing the essence of prejudice to "honor."

In addition to the right of privacy, there are other torts that reflect concern with respect for personality. The fact that substantial damages can be recovered in defamation per se even though no economic, physical, or any other kind of definite harm is shown suggests that the interest that is being protected is the plaintiff's honor.[13] This is also true for assualt, battery, false imprisonment, malicious prosecution, intentional infliction of mental distress, alienation of affections, intentional interference with voting, and for invasion of analogous civil rights provided

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[9]Id. at 205.

[10]Id. at 207.

[11]2 DeG. & Sm. 652, 64 Eng. Rep. 293 (High Ct. of Chan. 1849), aff'd, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1849).

[12]Warren & Brandeis, supra note 8, at 208.

[13]Dobbs, Remedies § 7.3 (1973).

by statute.[14] These latter torts have been identified as protecting personality or interests in personal dignity.[15]

Finally, the right of personality and its link with "honor" has been recognized in American legal philosophy. Roscoe Pound, for example, as early as 1915, identified three interests of personality: (1) the physical person, (2) honor (reputation), and (3) belief and opinion.[16] Pound was very careful to distinguish the protection of honor and dignity from the protection of substance or assets, but he recognized that they could overlap, as in defamation, where injury to reputation could take the form of economic loss as well as loss of self-esteem.

III. The Structure Of Federal Protection Of the Moral Rights of Visual Artists

Since the author's personality is present in all works of artistic creativity, federal protection of moral rights should not be limited to the visual arts. The Berne Convention extends moral rights to all "literary and artistic works "[17] and the new British Act recognizes moral rights in dramatic, musical or artistic works and films.[18] However, there is nothing wrong in principle in proceeding incrementally, as long as it is expressly acknowledged that providing some sort of moral rights protection for a segment of authors neither fulfills our Berne obligations nor provides comprehensive protection. It is also important not to preempt state and common law protection when it provides significantly greater protection. The admission that the Kennedy bill is but the first step can be accomplished easily enough by appropriate statements in the legislative history, but the preemption provision is so worded that there is a very real danger that more comprehensive, existing protection will be preempted.

Section 5(f)(1) of the Kennedy bill preempts state and common law rights "that are equivalent to any of the rights conferred by section 106A [rights of attribution and integrity] with respect to works of visual art to which the rights conferred by section 106A

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[14]Id.

[15]Id.

[16]"Interests of Personality," 28 Harv. L. Rev. 343, 355 (1915).

[17]"The expression 'literary and artistic works' shall include every production in the literary and scientific and artistic domain, whatever may be the mode or form of its expression...." WIPO Guide, supra note 2, at art. 2.

[18]British Act, supra note 4, at § 2.

apply." The word "equivalent" is already used in the preemption provision of the Copyright Act of 1976,[19] and it has not been strictly construed to require that the state right be exactly coextensive with the federal right.[20] Thus, it is arguable that the right of pseudonymity, which is granted by the moral rights statute of Senator Kennedy's home state of Massachusetts,[21] would be preempted as "equivalent" to the federal right of attribution contained in the bill. Since the World Property Organization (WIPO), which administers the Berne Convention, has taken the position that the right of attribution includes the right of pseudonymity,[22] the result would be to lessen the compliance of American law with article 6bis. Doubtless there are other examples in the nine states that have enacted comprehensive moral rights legislation. More reassuring was the language of one of the earlier versions of the Kennedy bill: "Nothing in section 106a [rights of attribution and integrity]...preempts the common law or statutes of any State except to the extent that such common law or statutes would diminish or prevent the exercise of the rights conferred by, or the implementation of, section 106a...."[23]

A. Works Protected

If incrementalism is to be the way that comprehensive federal protection of moral rights is to be introduced, it is logical to begin with that class of works which would be lost by irreparable physical changes, viz., paintings, drawings, and sculpture existing in a single copy. It is also logical to extend protection to multiples, such as prints and multi-cast sculptures in limited editions, since each print or each casting can be said to be unique, despite the fact that it will resemble the other prints or castings. It is not logical, however, to include limited edition prints and multi-cast sculptures in limited editions and not to include photographs in limited editions.

It is commendable that the Kennedy bill goes beyond nonsubstitutable works in also protecting reproductions of paintings, drawings, and sculpture, although the limited edition qualification is not easily rationalized. In the case of a print, multi-cast sculpture, or photograph, the limited edition criterion supports the determination that each print or casting is unique.

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[19]17 U.S.C. § 301 (1989) [hereinafter Copyright Act].

[20]Nimmer, Copyright § 1.01[B] (1988).

[21]Mass. G.L.A. c. 231 § 85S(d) (Supp. 1987).

[22]WIPO Guide, supra note 2, com. 6bis.3.

[23]S. 1619, 100th Cong., 2d Sess. § 10(e), version marked 10/17/88.

in the case of a reproduction, such as a photographic print of a painting, claims of uniqueness are irrelevent because all faithful copies are fungible; therefore, there is no need to limit them to a certain number of copies. The rationale for protecting reproductions is not that they are unique works of art, but rather that the reproductions should portray, as much as they can given the medium of reproduction, the expression of the artist's personality as found in the original. This rationale does not justify restrictions to limited editions, since concern for fidelity of reproduction may be present even if there is mass reproduction.

The global exclusion of works made for hire in the Kennedy bill is also unjustifiable given the narrow scope of works protected. Since the moral rights in the Kennedy bill apply to the owners of copyright and to the owners of the material object in which the work is embodied, the work for hire exclusion must be justified on reasons that do not equally apply in those circumstances. In the case of paintings, drawings, prints, and sculptures existing in single copies, moral rights would be violated by physical acts done to the works themselves. In the employer/employee relationship, it would seem that there would be little need to commit such acts. Ordinarily, the acts would consist of acts done to copies of originals in the process of making reproductions. In the case of a publication, for example, it is ordinarily not necessary to alter the original in order to reproduce it in a different form in a newspaper or magazine. Furthermore, the right of faithful reproduction in the Kennedy bill only applies to limited editions of 200 copies or fewer; therefore, it would not apply to newspapers and magazines of mass circulation. In the case of commissioned works, it is again difficult to see why there should be a need for a special freedom to make physical changes to a painting, drawing, print, or sculpture[24] that does not exist in the case of owners of copyright and the material object. The usual case would seem to be publications that use commissioned drawings, but, as in the case of the employer/employee relationship, the question would be one of faithful reproduction, and the Kennedy bill only applies to reproductions in limited editions of 200 or fewer. In any event, the above analysis suggests that the proponents of the work made for hire exclusion should have the burden of showing how the limited moral rights recognized by the Kennedy bill would pose insurmountable problems in their undertakings.

B. Rights Recognized

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[24]It is not readily apparent how a sculpture could fit the definition of work made for hire as a commissioned work. See 17 U.S.C. at § 101 "work made for hire."

The Kennedy bill essentially complies with article 6bis by recognizing the right of attribution and the right of integrity. There is room for improvement, however, in three areas. First, it would be advisable to add language to the right of integrity in order to indicate clearly that unfaithful reproduction would violate the right for limited editions of 200 or fewer even for protected works outside of limited edition prints and multi-cast sculptures. Second, in the case of paintings, drawings, and sculpture in a single copy and in the case of the limited edition prints and multi-cast sculptures covered by the bill, any change caused by physical act to the work should be a per se violation of the right of integrity, since, by definition, the honor of the author is injured. An irreparable, physical change to the work effectively causes the work to be lost and to fail to communicate the author's artistic vision. Such as per se rule is not indicated in the case of ordinary reproductions, since the original is not lost no matter how distorted the reproduction may be. Third, the right against destruction should not be limited to works of recognized stature. Limiting moral rights to works of recognized stature has no justification in moral rights theory or in the Berne Convention, and it is contrary to American copyright tradition to condition rights on artistic merit. Such a limitation does not exist in French law or in the recently enacted British Act.

Presumably, the "of recognized stature" criterion was motivated by concern over law suits stemming from the destruction of insignificant works, such as a child's drawing. (Because of the narrow definition of works protected in the Kennedy bill, the right against destruction would not be extended to mass reproduced works.) It is curious, however, that the "of recognized stature" criterion is not imposed on the right against distortion, mutilation, or other modification, yet it is quite easy to imagine a child's drawing being mutilated rather than destroyed. If the "prejudicial to honor or reputation" qualification is sufficient to make law suits unattractive in the case of the right against modification, it would seem to be equally serviceable in the case of destruction. It would seem that just as courts are capable of distinguishing between a pinch and an amputation in the case of pain and suffering, they would be equally capable of distinguishing between the indignity of the destruction of a child's drawing and Tom Van Sant's mural.

The right of attribution recognized in the Kennedy bill does not measure up to the requirements of article 6bis nor does it provide comprehensive protection. WIPO indicates that the right of attribution envisioned by the Berne Convention has the following components: (1) the right to claim authorship, (2) the right to publish pseudonymously or anonymously, (3) the right to reject pseudonymity and anonymity, (4) the right of the author not to have his name associated with a work that is not his, and (5) the right of the author not to have his name associated with a work that he

did not create.[25] The Kennedy bill does not provide for anonymity or pseudonymity at all.

C. Assignment, Waiver, and Consent

The most courageous and realistic provision of the Kennedy bill is the provision that makes the moral rights recognized by the bill nontransferable and nonwaivable. This is consistent with WIPO's interpretation of article 6bis, and it is required to avoid making federal moral rights legislation an exercise in futility. Without such a provision, given the bargaining power of most authors, the waiver or transfer of moral rights would soon appear as boilerplate in all contracts.

Inalienability of certain rights is not foreign to American copyright law. The power of termination of transfers and licenses granted by the author, found in section 203 of the Copyright Act, states in subsection 5: "Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant." The power of termination is the successor to the renewal provision of the 1909 Act, of which former Register of Copyrights, Barbara Ringer, stated that Congress provided because it recognized that "author-publisher contracts must frequently be made at a time when the value of the work is unknown or conjectural and the author (regardless of his business ability) is necessarily in a poor bargaining position."[26]

Nontransferability and nonwaivability do not surrender others to the whims and caprices of authors. The meaning of nontransferability is that some one other than the author may not exercise the author's moral rights when he is capable of doing so. The meaning of nonwaivability is that the author cannot contractually bind himself not to assert his moral rights. This does not mean that the author cannot consent to what would ordinarily be a violation of moral rights, but it does mean that he cannot be held to his consent if he changes his mind before the other party has detrimentally relied. For example, if an author consents to an irreparable change to his work of visual art, he cannot sue once the change has occurred.

D. Remedies

Not enough thought has been given in the Kennedy bill to whether it is appropriate to adopt wholesale the copyright

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[25]WIPO Guide, supra note 2, at com. 6bis.3.

[26]Ringer, "Renewal of Copyright," in Studies in Copyright (1960), excerpted in Latman & Gorman, Copyright for the Eighties: Cases and Materials 207 (2d ed. 1985).

infringement remedies in the Copyright Act as remedies for violation of moral rights. There is no problem with injunctions, but the language of the Act regarding monetary damages is not apt regarding the kind of interests protected by moral rights. As has already been pointed out, violations of moral rights are more akin to violations of the right of privacy, defamation per se, and the other right of personality torts; thus, the Copyright Act's provisions for recovery of actual damages and profits would often be inappropriate.[27] In many cases, the author would be limited to statutory damages, but the amount of statutory damages in some cases would be too high ($200 for the mutilation of a child's drawing?) and in other cases would be too low (only $100,000 for the intentional destruction of a Jasper Johns painting?).[28] Moreover, statutory damages for American works could be precluded by nonregistration.[29]

It would be a better solution to leave the calculation of monetary damages to the courts, as long as they have been instructed about the nature of the interest protected. It should be noted that monetary damages have not been awarded in an entirely arbitrary and irrational manner in the case of such right of personality torts as the right of privacy; rather, the courts have focused on factors such as whether the tort was committed publicly; the nature, motive and extent of the defendant's conduct; and the plaintiff's own motives and misbehavior.[30] It also seems appropriate for the court to consider the value of the work.

E. Duration

The adoption of the copyright term for the duration of moral rights in the Kennedy bill is consistent with the requirements of the Berne Convention, but it may very well be argued that by doing so the secondary benefit of moral rights protection, viz., the preservation of our cultural heritage, is weakened. Since there is no register of culturally significant paintings, drawings, prints, and sculpture, in most cases fifty years after the author's death no one will have standing to prevent the destruction or mutilation of such works. Furthermore, a work of visual art does not any less express the author's personality fifty-one years after his death. Therefore, the possibility of perpetual protection should be seriously considered. Moral rights in France are perpetual, and in the United States, even today, common law copyright is perpetual. The constitutional requirement that

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[27]17 U.S.C. § 504(b).

[28]17 U.S.C. § 504(c).

[29]17 U.S.C. § 412.

[30]See generally, Dobbs, supra note 13.

copyright protection be for "limited times"[31] is not an insurmountable obstacle, since the copyright clause was directed at what we would now call the economic rights as distinguished from the moral rights. Moral rights, as we have seen, are more akin to torts protective of the personality. If moral rights are to be made perpetual, however, it would be prudent not to make the legislation recognizing them part of the Copyright Act.

IV. Conclusion

The Kennedy bill is a commendable first draft for moral rights of authors of works of visual art. There is nothing wrong in principle with opting for incrementalism by beginning protection with works of visual art narrowly defined. The most serious concern, though, is that its preemption provision will actually reduce the scope of moral rights protection that already exists in some states, including New York and California, states well-known as centers for the arts. Lesser concerns are: (1) the exclusion of photographs of a limited edition of 200 or fewer; (2) the limitation of protection of the fidelity of reproductions to limited editions of 200 or fewer; (3) the seemingly knee-jerk exclusion of works made for hire; (4) the limitation of the right against destruction to works "of recognized stature;" (5) the exclusion of anonymity and pseudonymity from the right of attribution; and (6) the "bad fit" that results from applying the Copyright Act provisions for monetary damages to moral rights violations. None of these lesser concerns, however, are serious enough to reject the bill, since they are all susceptible to remedy by later amendment. When these concerns are united to the preemption provision, however, moral rights advocates will have to seriously consider whether they will be in a better provision after the bill becomes law.

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[31]U.S. Const., art. 1 § 8.

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August 4, 1989

Senator Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights and Trademarks
United States Senate
Committee on the Judiciary
Washington, D. C. 20510-6275

Dear Senator DeConcini:

Your follow up questions to my June 20, 1989 testimony on the Visual Artists Rights Act of 1989 (S. 1198) reached me while I was out of the country. Please forgive this tardy response; I hope that my answers will still be useful.

Question 1.

I take it from your statement that you are a strong supporter of a unified and comprehensive system of moral rights in the copyright law for all artists and creators. You would extend moral rights to painters, sculptors, film-makers, authors, photographers, and all other artists. After reading your statement, however, I am still left with the threshold questions of "why". You seem to give four reasons, neither of which I find persuasive for a wholesale and drastic change in our copyright law. First, you say that "federal protection of moral rights of visual artists is based on the recognition that works of visual artists communicate an aspect of the artist's personality." But you fail to tell us how such recognition is lacking presently or what problems such recognition has caused. Secondly, you tell us that moral rights benefits society, but do not give us any explanation of how. Thirdly, you say that moral rights will help protect our cultural heritage without any explanation. And lastly, you make an argument expressly rejected by this subcommittee and the Congress as a whole last year, namely that express moral rights in our copyright law is required by the Berne Convention.

As a member of Congress who believes that we should not pass laws just because someone asks us to and because they won't do any harm, why should be enact moral rights legislation?

Answer 1.

Contrary to your assertion, my written statement deals with each of the points you raise in Question 1.

First, there is clear authority in American law that a work of art embodies the personality of the author. On page 3 of my statement, there is a quotation from the 1903 case of Bleistein v. Donaldson Lithographing Co. in which Justice Holmes recognizes that a work of art expresses the artist's personality. This is reiterated (also on page 3) in the 1985 case of Harper & Row v. Nation Enters. in which the U.S. Supreme Court stated that the right of first publication in the Copyright Act of 1976 protected the personal interest of the author in creative control. The concept of moral rights is nothing but a logical implication of this recognition. (The rest of Part II of my statement is devoted to showing other proofs of recognition of the personal aspect of artistic production.)

Although federal copyright law recognizes the concept of the work of art as expression of the artist's personality, it has not clearly recognized moral rights. On page 1 of my written statement, I give two examples of the current failure of American law to accept the implications of its recognition that a work of art is the expression of the artist's personality, viz., the stabilizing and repainting of a Calder mobile in Pittsburgh's airport and the destruction of Tom Van Sant's mural--neither of which could be prevented under contemporary law. Such examples, of course, could be multiplied and are often cited in the relevant literature.

The recognition that a work of art embodies the personality of the artist has not caused any serious problems in U.S. law to my knowledge. Since moral rights are not clearly recognized in in federal copyright law, there have not been serious problems. In the ten states that have adopted moral rights statutes, there is no evidence of serious disruption.

Second, the last paragraph on page 1 of my written statement explains how the recognition of moral rights will benefit society. Current federal copyright law is based on the premise that artistic production will be encouraged by assuring artists a commercial reward for their efforts. As Judge Lumbard recognized in the 1976 case of Gilliam v. ABC, artistic

production will also be encouraged by assuring artists that their work will not be altered or destroyed with impunity.

Third, it is obvious that federal moral rights protection will help preserve our cultural heritage by allowing the producers of that cultural heritage to prevent alteration and destruction of their work.

Fourth, Congress did not vote to adhere to the Berne Convention on the basis that American law complied with the language of article 6bis; rather, it took the position that since the laws of other Berne members did not comply with the language of article 6bis, a lesser degree of protection was sufficient for Berne membership. Thus, Congress deemed the "requirements" of article 6bis to be other than the language of article 6bis. Having redefined the requirements of article 6bis so that some evidence of moral rights protection was enough, the spotty protection of moral rights in the United States in the common law, under the Lanham Act, and in eight (now ten) states qualified. I protested against this sleight of hand in my September 30, 1987 testimony before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

When the degree of moral rights protection afforded by American law is placed alongside the language of article 6bis, no one can honestly maintain that American law measures up. It is hypocritical of the United States to enforce strictly the economic articles of the Berne Convention against noncomplying nations, while at the same time to take a casual approach to article 6bis. Thus, the United States is under a moral obligation to follow the example of the United Kingdom which recently amended its copyright law to conform more closely to the language of article 6bis.

In conclusion--and in response to the last part of Question 1--the many instances in which works of art have been altered or destroyed without legal recourse argue for moral rights legislation. The theoretical basis for the recognition of moral rights already exists in American law which has expressly referred to the artist's personal interest in his work. The United States also has a moral obligation to comply with the language of article 6bis of the Berne Convention. The recognition of moral rights will encourage artistic creativity and will help to preserve our cultural heritage.

Question 2.

You suggest that a federal moral rights statute should not preempt state laws that offer greater protection to artists than

does the federal law. If this were the case, artists in one state may receive much greater protection than artists in another state, even after the adoption of a federal moral rights statute. One argument that proponents of a federal moral rights statute advance is the need for national uniformity. Wouldn't this argument be negated by your preemption suggestion?

Answer 2.

If the Kennedy bill were not to preempt state laws that afforded greater moral rights protection, there would be national uniformity in the sense that artists would be minimally protected in all jurisdictions rather than in just ten states. There would not be uniformity, however, in the degree of protection. There are many instances where federal legislation sets the minimum standard, but the states are free to enhance protection, e.g., state "blue sky" laws and federal securities regulation.

Thank you for the opportunity to further explain my positions. Your continued interest in the moral rights of authors is gratifying. Please do not hesitate to contact me if I can be of further use.

Sincerely,

Edward J. Damich

Edward J. Damich
Associate Professor of Law

Senator DECONCINI. Mr. Gorman.

STATEMENT OF ROBERT GORMAN, KENNETH W. GEMMILL PROFESSOR OF LAW, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, PHILADELPHIA, PA

Mr. GORMAN. Mr. Chairman, Senator Kennedy, it is an honor to be invited to testify before the committee today.

I have been a member of the faculty at the University of Pennsylvania for 25 years. During that period I have taught courses on copyright and on legal rights of artists and authors. I am deeply committed to the purposes of the copyright system, the promotion and dissemination of information on the arts, the enrichment of our cultural heritage, and the support for literary, artistic, and musical creativity.

I should disclose that for the past 3 years I have been serving as a consultant to the law firm of Proskauer, Rose, Goetz & Mendelsohn, based in New York and Washington, and recently in that connection I have undertaken a study of moral rights and the impact that moral rights would have on our cultural, information, and entertainment industries—films, publishing, music, and the like, at the request of an ad hoc group of producers and publishers.

I speak to the committee today not as a spokesperson of the law firm or for this group, but as an independent academic whose initial enthusiasm for moral rights has, on further study, become somewhat tempered and replaced by doubts about the wisdom and feasibility of incorporation of comprehensive moral rights into the American legal system.

I want to say that when I use the term "comprehensive moral rights legislation," I mean to separate myself from a discussion of the visual arts bill recently introduced. I have relatively little difficulty with the concepts and implementation of that bill. I am speaking about the application of moral rights more generally to a wide range of the cultural and arts and entertainment industries in this country.

On reflection—and somewhat reluctantly, I might say—I have reached the conclusion that comprehensive moral rights legislation would likely be ill-advised. I believe it would unsettle longstanding, successful, and productive contractual and business arrangements; may threaten investment in many cultural and entertainment vehicles, and therefore their public dissemination and the resulting enrichment of our cultural heritage; and would conflict with fundamental American rules of copyright law, contract law, property law, and even constitutional law, and may, in fact, inhibit creativity rather than advance it.

To understand my position, I would like to provide an overview and just articulate three particular features that characterize the arts, entertainment, and news industries in this country.

First of all, most of these industries are intensely collaborative. Theatrical and television film involves a producer bringing together a director, a screenwriter, a cinematographer, a composer, designers, actors, and actresses, and the like. The producer's investment of funds and creative ideas brings the work to the market-

place. Collaboration also typifies the production of news magazines, newspapers, and many books, particularly in the educational field.

A second feature of our cultural and entertainment industry worth pointing out is that in very large degree they are driven by the opportunity to exploit works through certain subsidiary channels. Theatrical films are shown on broadcast and cable television, by satellite, in airplanes, in foreign languages, and sold and rented in cassette and disc forms. Persons will be encouraged to invest in the production and dissemination of these works only if there is some assurance that these subsidiary uses will be available and that these works can be brought in many forms to the marketplace without fear of intervention by any of the contributing collaborative authors.

A final aspect of these industries, as has been noted by the Senators this morning, is that the rules and regulations guiding these industries are determined by a network of privately negotiated agreements—sometimes by individuals, but sometimes by sophisticated and strong collective bargaining representatives. It seems to me that a case must be made by the proponents of moral rights that the presently existing system of contractual arrangements which brings a variety of works to the American and foreign marketplace is not working successfully and is causing some pervasive injustice. It seems to me that the burden of changing these contractual rules that now govern these industries and the marketplace for entertainment and cultural vehicles—the burden of showing that this network is not working effectively must rest with those who believe that Government should intervene and comprehensively change the prevailing rules of law.

I see that the light has turned red. I don't know if my time has been tacked on to that of Professor Damich; it apparently has not.

Senator DECONCINI. Nice try, Mr. Gorman. [Laughter.]

I am sorry that we have to conclude, but we do have a number of questions we want to ask. Your full statement——

Mr. GORMAN. I intend to file a full statement with the committee within the next week.

[The prepared statement of Mr. Gorman follows:]

STATEMENT OF ROBERT A. GORMAN

Kenneth W. Gemmill Professor of Law

University of Pennsylvania

Before the Senate Subcommittee
on Patents, Copyrights and Trademarks

June 20, 1989

Mr. Chairman and Members of the Subcommittee:

I am honored to be here today as an invited witness to discuss with you the subject of moral rights, principally within the film and publishing industries and outside of the field of singular works of art dealt with in Senator Kennedy's recently introduced bill, S. 1198, the Visual Artists Rights Act of 1989.

I have been on the faculty of the University of Pennsylvania Law School for twenty-five years, and have regularly taught courses on Copyright and on the legal rights of artists and authors. I have for the past three years also served as consultant to the law firm of Proskauer Rose Goetz & Mendelsohn, in which capacity I recently prepared a memorandum on the subject of moral rights at the request of an ad hoc group of representatives of film producers and book and magazine publishers. That memorandum afforded me an opportunity to explore more deeply the arguments for and against the introduction of comprehensive moral rights legislation in the United States. I offer my comments today not as a spokesman for the law firm or for the ad hoc group but rather as a scholar who has studied, taught about and written about moral rights.

I am deeply committed to the purposes of our copyright system: the promotion and dissemination of information and of the arts, the support of literary, artistic and musical creativity, and the enrichment and preservation of our cultural heritage. Proponents of moral rights legislation are generally motivated by the same objectives. They believe that the arts will be nourished and protected by granting the rights of paternity (or attribution) and integrity. Nonetheless, my own study of moral rights and of the U.S. cultural and entertainment industries to which comprehensive moral rights legislation would be applied gives me great pause.

I have reluctantly reached the conclusion that such comprehensive legislation is likely to be ill-advised. It is likely to be impracticable in its application; to be unsettling in its impact upon longstanding contractual and business arrangements; to threaten investment in and public dissemination

of the arts; to sharply conflict with fundamental U.S. legal principles of copyright, contract, property and even constitutional law; and ultimately to stifle much artistic creativity while resulting in only the most speculative incentives to such creativity.

I should like, at the outset, to point out certain characteristics of the arts and entertainment industries -- particularly motion picture films (both theatrical and television films) and book, newspaper and magazine publishing -- that are pertinent to moral rights legislation.

Most of the product of these industries is intensely collaborative. In film, for example, the producer brings together a director, screenwriter, designers of sets and costumes, cinematographer, composer, actors and all manner of technical and creative contributors. The producer takes the economic risks, and exercises business and commonly creative control.

Magazine and newspaper publishing is also a collaborative enterprise, where there must be centralized business and creative control in order to coordinate -- often under the most exigent time constraints -- the work of news writers, feature writers, photographers, layout designers and others. Book publishing, particularly educational publishing, is also collaborative, with the publisher exercising essential control from overall planning to the details of content and writing and pictorial style.

The second pertinent feature of the arts and entertainment industries is their utilization of their works in a variety of "subsidiary" uses. Motion picture films are shown not only in theaters, but also on broadcast and cable television, over satellites and on airplanes, and in foreign nations, and they are marketed in cassette and disc form through rentals and sales. These uses contemplate all varieties of editing in terms of time-frame and content, commercial interruptions, dubbing in foreign languages, and the like.

Published books are also commonly exploited through revised editions and in subsidiary markets, including updated versions, abridgments, foreign-language editions, television and theatrical film versions, and adaptations that take advantage of new technological advancements, such as audiotapes (for trade books) and computer materials (for educational books). Educational books also contemplate frequent revisions, in order to update text and pictorial content.

This wide variety of revisions and adaptations of all kinds has made the so-called "subsidiary" uses in fact often the principal determinant of whether an artistic or entertainment vehicle will become profitable, will attract investment, and will therefore be developed and marketed to the public at all.

A third pertinent feature of the entertainment and cultural industries in the United States is that they have historically been regulated through elaborate contractual arrangements, voluntarily negotiated, and often negotiated on behalf of the principal creative contributors by strong and sophisticated labor organizations. These arrangements establish employer-employee relationships among most of the contracting parties and are negotiated within the framework of the "work made for hire" provisions of the Copyright Act. They commonly deal with such matters as the creative participation of directors, authors and the like in the development of subsidiary and derivative uses, and the credit to be given in connection with the exhibition, sale and advertising of the work.

The principal entertainment and cultural industries of the United States, in summary, are highly collaborative, contemplate and depend upon a wide variety of derivative forms in their distribution to the public, and are historically regulated by individually and collectively negotiated agreements. The introduction into these industries of a right -- exercisable by any one of a host of collaborative contributors -- to protest the alleged distortion or modification of a particular literary or artistic contribution is extremely problematic. At best, it introduces an element of instability and uncertainty, as well as the frequent possibility, because of the increased threat of litigation, of delay in public access to and enjoyment of entertainment vehicles. At worst, it threatens to prevent altogether the dissemination to the U.S. and international public of a host of cultural and entertainment materials in forms that are varied, appealing and affordable. Any significant limit upon the ability of producers and publishers to disseminate works in these secondary markets -- dissemination which commonly can mean the difference between a losing and a profitable business venture -- runs a substantial risk of chilling investment in the arts and entertainment fields, which in turn may reduce the financial support of innovative creative endeavor, a result that will obviously be harmful to the public interest. Introduction of moral rights into these industries (particularly if these rights are statutorily declared to be inalienable and non-waivable) will also unsettle the network of contractual arrangements that have been developed over many years in the various industries, and that appear on the whole to be working quite successfully and fairly.

Before such a drastic step is taken, it would seem that the burden is upon those challenging the present system to show that it has caused serious and pervasive hardships or injustice. The industries under discussion are effectively generating creative works, bringing them to the American public, making them attractive to consumers overseas and thereby aiding dramatically in the U.S. balance of trade. All of these beneficent effects have been brought about through voluntary arrangements in the

commercial marketplace. I do not believe that the case has been made for substituting for these arrangements a congressionally granted power of aesthetic veto to a wide range of creative contributors. In sum, it may be that comprehensive moral rights legislation is a drastic cure for what is a relatively undiscernible malady.

It is natural to ask whether untoward consequences have flowed from the incorporation of moral rights doctrine into the legal systems of many European and Latin American nations. Many of these nations appear to have flourishing creative communities in the arts and entertainment fields. Surely, however, the United States is the world leader in these fields. Whether that is to any major extent attributable to the greater legal and business flexibility accorded producers, publishers, and other copyright owners and licensees under our legal system is difficult to determine empirically -- as it is to determine whether, say, the creative arts in France or Italy would flourish to a greater degree were moral rights abandoned or sharply limited. One can reasonably assume, however, attributing economic rationality to those who invest in the arts and entertainment industries, that such investment will be promoted under a legal system in which authors -- many of them working in the context of collaborations or of employment relationships -- will not be accorded the right to exercise an aesthetic veto over the initial and secondary marketing of films, magazines, books and the like.

Even apart from economic modeling, moral rights abroad have indeed resulted in some odd limitations upon the display and marketing of works by copyright owners and licensees. Owners of buildings have been limited in making structural changes or in tearing down walls with murals. In a particularly noteworthy case decided under the Canadian moral rights statute, a sculptor who had conveyed to a shopping center his sculpture of geese in flight was afforded an injunction against the center's bedecking the geese with ribbons at Christmas time. Creators of music in the public domain have successfully challenged the use of that music in motion pictures deemed inconsistent with the political views of the composer, and artists have been permitted to challenge the exhibition of their works in a physical or artistic context they believed unsuitable. A textwriter of a book successfully challenged the publisher's selection of an illustrator on the ground that the illustrations were inferior in quality. A songwriter (apparently after having transferred the copyright to another) has secured redress against the performance of his song with parody lyrics. Courts have been invited to sit in judgment upon the nature and number of commercial interruptions in films shown on television. Set designers have successfully challenged the deletion of a theatrical scene in which their set was to appear, and stage directors have successfully challenged the modification or omission of their stage directions.

Moreover, speaking more generically and summarily, employees have asserted rights over employers in the exploitation of works made for hire, one joint author has been able to stop the marketing of a work prepared along with other joint authors, and authors have been able to override negotiated contract provisions with publishers regarding the editing and marketing of their works.

Not to neglect consideration of the right of attribution, foreign courts have ordered radio stations to mention the names of all composers, lyricists, and performers of all broadcast music; have accorded redress to an architect whose name was not mentioned at the ceremony opening his building or in the attendant newspaper articles; and have permitted an author to ignore his contractual promise to produce certain works under a pseudonym.

To some extent, then, moral rights doctrine as developed abroad has indeed resulted in some disturbing inhibitions upon the rights of copyright owners and licensees, and property owners, seeking to disseminate or adapt creative works. But it appears that the arts and entertainment industries abroad have learned to live with moral rights by largely ignoring those rights or substantially watering them down. Rights of attribution and integrity have -- by statute or judicial decision -- not been enforced when a user is taking action that is consistent with "proper usage" or with the "accepted manner and extent" or that is "reasonable" or "de minimis." A most significant limitation upon the integrity right, applied in most foreign nations, is the right given to licensees to make alterations and modifications that are appropriate in light of the nature of the work and the purpose of the use; these are deemed allowable "adaptations" and are distinguished from "distortions," after the court considers whether the modifications preserve the "spirit, character, and substance of the work."

In many nations, sharp limitations are placed upon moral rights in certain kinds of works, such as musical compositions, useful articles, computer programs, and materials prepared for news publications or broadcasts. Despite the sometimes recited theory to the contrary, it is commonplace to permit moral rights to be waived, either in written or oral agreements or pursuant to the industry's customs and usages. In almost every foreign jurisdiction that recognizes the right of integrity, the author is required to assert that right in a fair, reasonable and good faith manner; the right will not be enforced if it is asserted "arbitrarily" or "vexatiously" or is "misused." A number of national laws incorporate the doctrine of fair use as a defense against moral rights claims (as with copyright claims), or permit certain educational uses or parodies. Frequent adjustments are made for moral rights asserted by employees, or by joint authors, or by creative collaborators in works such as motion picture films, encyclopedias and periodicals.

These exceptions to moral rights have been incorporated in the law of foreign jurisdictions over time and through adjustments that take account of the special dimensions of particular societies and cultures in a variety of nations. It cannot be expected that such ameliorative doctrines could be legislatively incorporated whole-cloth into U.S. law if a comprehensive moral rights law were to be enacted here. It would be particularly unfortunate if such a law were to be read by our courts as an invitation to strict application, without these ameliorative doctrines. But it would not be much better -- from the point of view of persons undertaking investment in the arts and entertainments fields -- to leave it to the courts to introduce piecemeal a variety of needed exemptions and defenses, particularly when the foreign experience suggests that these exemptions and defenses will almost inevitably turn upon aesthetic and subjective assessments which go well beyond the expertise and proper role of judges and juries.

Perhaps my greatest concern about the comprehensive incorporation of moral rights into U.S. law is the flat inconsistency between moral rights and a number of fundamental U.S. legal principles relating to copyright, to the public domain, to property, to contract, to constitutional law, and to the judicial role.

Moral rights will inevitably conflict with copyright by permitting an author to veto certain uses of a work contemplated by the current copyright owner. The copyright owner holds the exclusive right to prepare derivative works. As noted above, the right to adapt, edit, translate, abridge, and the like are perhaps the most important rights of the copyright owner today; they may determine whether investors will support the creation and distribution of that work to the U.S. and foreign public. No moral rights law with which I am familiar successfully accommodates the rights of the author and of the copyright owner after copyright has been transferred. Also as noted above, moral rights held by individual authors will inevitably conflict with the copyright interests of other joint authors and of employers in works made for hire.

Our legal system has a number of policies that support the cultural enrichment of our public domain. Our fair use doctrine and a host of statutory exemptions contemplate educational uses, parodies, news reporting and cultural criticism, parodies and the like. The first amendment to the Constitution incorporates the same values, and the patent and copyright clause of the Constitution contemplates statutory protection for only a limited time. All of these concerns for the public domain, and for fair dissemination and comment, may be jeopardized through the adoption of comprehensive moral rights legislation -- particularly if, as in a number of foreign nations, moral rights are deemed to last perpetually, or at least for a longer period than the copyright.

Property laws give the owner of a chattel -- including a painting or sculpture -- the right to place it, display it, frame it, or store it in any reasonable location or manner (and even probably in unreasonable ones). Owners of structures are commonly understood to have the right to make adjustments in those structures or even to destroy them. The compatibility of moral rights with these property ownership rights has been difficult to ascertain (witness the Canadian Geese litigation).

Moral rights legislation will also create conflicts with the variety of individually and collectively negotiated contracts that permeate the film, broadcasting, and magazine, newspaper and book publishing industries. In the U.S. legal system, we have traditionally valued the use of freely negotiated contracts to allocate rights and duties of the various participants in an enterprise. Examples are the employment agreement, the agreement among collaborative authors, and the author-publisher agreement. Government will sometimes step in to dictate the terms of contracts, but this is generally done only when the present contractual arrangements are regarded as significantly unjust or abusive, or unprotective of central social values. It does not seem to me that the case has been made that the present system of governing private relationships in the various industries is so dysfunctional as to warrant governmental intervention. It is not clear to me precisely what injustices are being worked by that system.

Finally, as has been suggested above in discussing the foreign experience, the incorporation of moral rights into U.S. law will inevitably bring before judges and juries matters of aesthetics for which they are ill-suited. How will it be determined whether there is prejudice to an author's honor and reputation, or whether certain changes are "adaptations" rather than "distortions," or whether a plaintiff's claims are abusive, or whether a fair use doctrine will apply (and how will it compare to the fair use doctrine in copyright)? Will these standards be determined by a subjective or an objective test? And how will they accommodate the policies that underlie the First Amendment?

It is true that certain comparable questions are treated in the context of other legal doctrines such as defamation, privacy, copyright, and the Lanham Act. But the latter are more familiar to our legal system and those charged with interpreting our legal rules. The latter U.S. legal doctrines also take into account a number of countervailing policies that are attentive to the public interest in access to information and culture, such as the First Amendment, fair use, the requirement of public confusion in trademark cases, and the termination of the pertinent tort claims upon the death of the plaintiff.

Whether or not similar defenses are incorporated amidst the unfamiliar contours of moral rights, the result will be the

introduction of great uncertainty and unpredictability into our law. Uncertainty and unpredictability are surely a common feature of our legal system. But I believe that we should be reluctant to introduce them into cultural and entertainment industries that are flourishing, that are attracting investment and providing U.S. artistic leadership in the world, and that touch upon concerns for free expression and creativity at the core of our constitutional and social system.

This Subcommittee and its counterpart in the House of Representatives, as well as the Congress generally, reached the conclusion, in connection with the enactment of the Berne Convention Implementation Act of 1988, that the United States already accords rights equivalent to moral rights through various existing state and federal laws. I share that view. I believe that the most worrisome abuses of authors' and artists' rights can be rectified through our laws of unfair competition, contract, defamation, privacy, trademark, copyright, and artists' rights statutes in now ten states. It is true that even the totality of these U.S. counterparts falls short of the most far-reaching applications of moral rights theory abroad. But I believe that the limitations in these U.S. laws comport with our obligations under the Berne Convention and, as just noted, that they are on the whole satisfactory if not indeed beneficent as a matter of public policy.

In conclusion, I would note that most of the criticisms I have expressed in this statement with regard to comprehensive moral rights legislation do not apply within the sphere of concern of S. 1198, the Visual Artists Rights Act of 1989. That bill would bar the physical distortion, mutilation or destruction of what might be called singular works of art (as distinguished from mass-produced works, commercially oriented works, and works made for hire). The works of art protected by the bill do not emerge from a commercial setting akin to that described above in the film and publishing industries: art works are the product of individual inspiration and not collaboratively produced under entrepreneurial supervision, their principal economic value typically rests in their singular manifestation and only rarely in their exploitation in derivative forms and subsidiary markets, and there is typically lacking any kind of elaborate network of contractual relationships that surround the production and marketing of the work. The kind of conduct that the bill would forbid rarely has any redeeming social value or artistic purpose. As Senator Kennedy stated upon introducing S. 1198: "This bill addresses a narrow and specific problem -- the mutilation and destruction of works of fine art which are often one-of-a-kind and irreplaceable." As Senator Kasten said: "Works protected by this bill are one of a kind or very limited editions. When these works are altered or destroyed, they are gone -- forever. We have a duty to protect them."

The kinds of works protected by S. 1198, and the kind of conduct it proscribes, all contribute to making a strong claim for this type of moral rights legislation; enactment would have far fewer negative ramifications than I have outlined above regarding more comprehensive moral rights legislation. The fact that artists' rights laws already exist in ten states -- including those with greatest importance to artists and to the institutions that support the art market and art world -- provides further support for the contention that federal artists' rights legislation will provide valuable uniformity while working very little disruption in existing commercial practices.

Senator DECONCINI. Thank you.
Mr. Brown.

STATEMENT OF JACK E. BROWN, ESQ., LAW FIRM OF BROWN & BAIN, PHOENIX, AZ

Mr. BROWN. Senator DeConcini, Senator Hatch, members of the committee, the concern that I would particularly express today is that while in these hearings the visual arts are the center of attention, or may be, sight should not be lost of the effect of copyright law on other works of creative endeavor, and particularly the computer and high technology industries, with which I have some familiarity.

I would suggest in particular, endorsing Professor Gorman's statement which I just heard, that we appreciate fully the extent to which the creation and distribution of informational and artistic materials is dependent on economically viable business arrangements. The optimum business arrangements, both in terms of economics and fairness, I would submit, are best attained in almost all cases by allowing participants in the affected businesses a high degree of freedom to devise and implement their own contractual arrangements.

On the first subject of moral rights—and I would like a moment also to address the question of the author's rights under the provision of the copyright law providing ownership with respect to works made for hire, if I may—on the first subject of moral rights, I would suggest that those who propose the enactment of a Federal law to create some new author's rights that would not be recognized by the combined property/tort/commercial/unfair competition laws, as presently envisioned by our State and Federal courts, should carry an extremely heavy burden of persuasion. Each particular industry needs to be analyzed in terms of its own organizational structure and imperatives, but let me focus on two facts of interest in connection with the computer industry which may well have their equivalent in other copyright-based informational and cultural industries.

First, computer programs today most often are the product of relatively long periods of gestation by numbers of people working in teams, sometimes as employees of the company engaged in development work and sometimes not. Perhaps you noticed in Sunday's

New York Times that the personal computer software industry is increasingly writing programs by piecing together segments of code, utilizing the technique called object-oriented programming.

Second, computer programs are not finished products when they are first issued. If there is a program that has been written without a single bug at the time of its first issuance, I have not heard of it. Bugs are discovered during the course of actual use and consequently, the common experience is to issue "bug-fixes" in the form of updates or enhancements in regular course.

The notion, consequently, of a static work which an identifiable single author who may which to preserve in its pristine form simply doesn't fit the realities of an industry like the computer industry and, I suggest, perhaps some others.

Recognizing the commercial realities, Japan specifically adopted an amendment to its copyright law that, as one commentator has said, effectively abolishes moral rights in connection with computer products.

Perhaps even more telling, France—generally regarded, as Professor Damich has mentioned, as the birthplace of moral rights—amended its copyright law in 1984 to provide, in effect, an exclusion from moral rights for computer programs.

Now, qualifying a work as a "work made for hire" under copyright law is, as I indicated earlier, a related subject in that it is the determinative test for the purpose of determining authorship and copyright ownership in many cases. Two problems emerge, as to which I would offer a short comment.

First, there is a fair amount of uncertainty as to when a hired party may qualify as an employee under the general common law of agency, making the employer the author and the owner of the copyright for the work produced. The recent Supreme Court decision in the *Reid* case set forth a non-exhaustive list of factors relevant to that determination, listing 13 items, not one of which the Court said was determinative.

Incidentally, Senator DeConcini, a measure of the alarm with which the current situation is viewed may be seen from the article in the New York Times, reprinted in the Arizona Republic, under the headline "Copyright Ruling Could Cost Firms Billions."

Now, the problem is exacerbated by the fact that if it is determined that a work was not prepared by an employee within the scope of his employment, the hiree gains an inalienable right to be considered an author of the work. I have a very simple and preliminary suggestion in that regard, to make it clear by adding the term "computer program" to the list of categories of works that are within subparagraph (2), which will provide clarification that you can have those rights—you can have an arrangement between a contractor and someone commissioning a work that provides for the person commissioning the work to be treated, in effect, as an employer, and the work then treated as a work made——

Senator DECONCINI. Mr. Brown, can you please conclude?

Mr. BROWN. I just did.

[The prepared statement of Mr. Brown and responses to additional questions follow:]

STATEMENT

of

JACK E. BROWN

before the

SUBCOMMITTEE ON

PATENTS, COPYRIGHTS AND TRADEMARKS

of the

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

on

PROPOSED LEGISLATION AFFECTING
OWNERSHIP AND TRANSFERABILITY OF
INTELLECTUAL PROPERTY RIGHTS

CORRECTED June 20, 1989

STATEMENT OF JACK E. BROWN

Introductory Statement

I am a member of the firm of Brown & Bain, with offices in Phoenix, Arizona and Palo Alto, California. A significant portion of the practice of my firm in recent years has related to the protection of intellectual property, particularly advising companies engaged in the computer and semiconductor industries and related industries, as well as print and broadcast media. Although patent protection is increasingly sought for computer programs (in the form of method or design patents),[1] copyright law has been and remains the favored means for the protection of computer programs and computer screen interfaces (in the form of audiovisual works) in the United States and also in other nations.[2] Thus, I have a general interest in and am pleased to

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[1] See generally Anthony & Colwell, Litigating the Validity and Infringement of Software Patents, 41 Wash. & Lee L. Rev. 1307 (1984); Sumner & Lundberg, The Versatility of Software Patent Protection: From Subroutines to Look and Feel, 3 Computer Law. 1 (June 1986); Bender, The Case for Software Patents, 6 Computer Law. 2 (May 1989); Lastova & Hoffman, Patents: Under-utilized Leverage for Protecting and Licensing Software, 6 Computer Law. 7 (May 1989).

[2] See Brown, Recent International Trends in the Legal Protection of Computer Software, 2 J.L. & Tech. 167, 170-71 (1987).

Copyright statutes recognizing the copyrightability of computer programs were enacted in the United States [Pub. L. No. 96-517, 94 Stat. 3028 (1980)] in 1980; in Hungary [19 Copyright Law of Hungary 316 (1983)] in 1983; in Australia [Copyright Amendment Act, No. 43 (Austl. 1984)] and India [The Copyright (Amendment) Act, No. 65, 35 A.I.R. 919 (1984)] in 1984; in France [Law. No. 85-660, arts. 1 & 45-51, 1985 J.O. 7495ff], Germany [Law on the Amendment of Provision of Rules in the Field of

share with you my thoughts on the copyright law questions the Subcommittee is studying and various proposals for changes in the law.

I am particularly concerned that, while in these hearings other arts and publication media may be the center of attention, sight should not be lost of the effect of the copyright law on the computer and high-technology industries. Although no doubt each member of the Subcommittee is aware of the importance of those industries to our economic well-being, permit me to remind you and others who may hear or read these hearings that the computer software business accounts for a substantial portion of the $270 billion in revenues earned in 1988--more than 5.7 percent of the gross national product of the United States--by the various industries based on copyrights (book and magazine publishing, film production, music and its affiliated publication businesses and computer software creation).[3] The recent Report by the International Intellectual Property Alliance to the United

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Copyright Law of June 24, 1985, 1985 BGB1.I 1,137], Japan [Chyosakukenh, (Copyright Law), Law No. 48 of 1978, 2(1)(x)(ii)], Portugal [Code of Copyright and Related Rights, No. 45/85 (1985)], and the Republic of China [Copyright Law and its Enforcement Rules, Republic of China (1S85)] in 1985; in Korea [Copyright Law of Korea, No. 4016 (1986)] in 1986; in Singapore [The Copyright Act of 1987 (Nat'l Assembly)] in 1987; in Canada [Bill C-60, 2d Sess., 53d Parliament, 35-36 Elizabeth II, 1986-87] in 1988; and in the United Kingdom in 1985 [United Kingdom Copyright (Computer Software) Amendment Act of 1985, ch. 1(1)] and in 1988 [Copyright, Designs and Patents Act of 1988, ch.48, § 3(1)(b)].

[3] International Intellectual Property Alliance, Trade Losses Due to Piracy and Other Market Access Barriers Affecting the U.S. Copyright Industries 1 (April 1989).

States Trade Representative on trade losses in foreign countries estimated that piracy losses suffered by the United States computer software industry in 1988 in eleven "problem" countries (People's Republic of China, Saudi Arabia, Korea, India, Philippines, Taiwan, Brazil, Egypt, Thailand, Nigeria and Malaysia) totalled $547 million, almost half of the $1.3 billion in losses suffered in the aggregate by the piracy of software, books, motion pictures and records.[4] The importance of each of the copyright-based businesses in the United States to our economy, contributing over $13 billion in surplus to the United States trade balance in 1988,[5] is worth bringing to the forefront of our attention when we consider any change to the effective operation of the copyright law.

I would suggest in particular that we appreciate fully the extent to which the creation and distribution of communication and artistic materials is dependent on economically viable business arrangements. The optimum business arrangements, both in terms of economics and fairness, I would submit, are best attained in almost all cases by allowing participants in the businesses affected a high degree of freedom to devise and implement their own contractual arrangements.

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[4] Id. at ii.

[5] Id.

I.

MORAL RIGHTS OF AUTHORS

The first subject concerning which I would essay a brief comment in light of that thesis is the proposal sometimes made for enactment of a federal law of so-called moral rights--the term derived from the French law--for authors. Those rights are generally defined as the right to disclose a work--a right that is already protected by the copyright laws--and the rights of paternity, integrity and withdrawal.[6]

Some students in the field have concluded that "substantial protection" is available for the equivalent of moral rights under various provisions of American statutory and common

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[6] See generally Leiser & Spiessbach, Artists' Rights: The Free Market and State Protection of Personal Interests, 9 Pace L. Rev. 1, 7-15 (Winter 1989); Note, Artists' Rights in the United States: Toward Federal Legislation, 25 Harv. J. on Legis. 153, 156 (1988). Paternity refers to the author's right to have his name affixed to any reproduction of his work, as well as to preclude his name from being associated with work not of his creation. Integrity is the right to prevent others from altering, mutilating or distorting the creation without the creator's permission. Withdrawal is the right of the author to take back his work if it no longer represents his artistic vision. Such protection oftentimes is said to "give legal expression to the intimate bond which exists between a literary or artistic work and its author's personality." Sarraute, Current Theory on the Moral Right of Authors and Artists Under French Law, 16 Am. J. Comp. L. 465, 465 (1968), quoted in Note, Moral Rights and the Realistic Limits of Artistic Control, 14 Golden Gate U.L. Rev. 447, 449 (1984).

law.[7] (The states of California,[8] New York[9] and Massachusetts[10] have enacted authorship rights statutes with some of the features of the French law.) Professor Damich disagrees.[11] But he also has argued that courts can and should draw upon the sources of the common law to recognize a general right of personality for authors which may be the equivalent of the French moral law.[12]

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[7] See Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st and 2d Sess., at 263-65 (1988) (statement of Kenneth W. Dam, Vice President, IBM Corp.) [hereinafter Dam Statement].

[8] Cal. Civ. Code § 987 (West Supp. 1989).

[9] N.Y. Arts & Cult. Aff. Law § 14.03 (McKinney 1988).

[10] Mass. Gen. L. ch. 231, § 85S (1987).

[11] See Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st and 2d Sess., at 545 (1988) (statement of Edward J. Damich, Assoc. Prof. of Law, George Mason University); Damich, Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 Colum.-VLA J.L. & Arts 655, 655, 663 (1986) (reprinted in hearings record following statement).

[12] Damich, The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors, 23 Ga. L. Rev. 1 (1988).

Adherence to the Berne Convention itself is not self-executing as to the obligations to be performed under the Convention. See Berne Convention Implementation Act of 1988, P.L. 100-568, §§ 2-3, 102 Stat. 2853, 2853; House Committee on the Judiciary, Berne Convention Implementation Act of 1988, H.R. Rep. 100-609, 100th Cong., 2d Sess. 23, 28-32 (1988); see also Dam Statement, supra note 7, at 267-69.

I would suggest that those who propose the enactment of a federal law to create some new authors' rights that would not be recognized by the combined property, tort, commercial and unfair competition laws as presently envisioned by our state and federal courts should carry an extremely heavy burden of persuasion.

Each particular industry needs to be analyzed in terms of its own organizational structure and imperatives, but let me focus on two facts of interest in the computer industry which may well have their equivalent in other copyright-based informational and cultural industries:

First, computer programs today most often are the product of relatively long periods of gestation by numbers of people working in teams, sometimes as employees of the company engaged in the development work and sometimes as persons engaged by the company to assist in the work outside the normal employment channels. Perhaps you noticed in Sunday's New York Times that the personal computer software industry is increasingly writing programs by piecing together segments of code utilizing the technique called object-oriented programming (OOPS).[13]

Second, computer programs are not finished products when they are first issued. If there is a program that has been written without a single bug at the time of its first issuance, I have not heard of it. Bugs are discovered during the course of

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[13] Lewis, Piecing the Software Together, N.Y. Times, June 18, 1989, § 3, at 9, col. 1.

actual use and, consequently, the common experience is to issue bug fixes in the form of updates or enhancements in regular course. Consequently, the notion of a static work that an identifiable single author may wish to preserve in its pristine form simply doesn't fit the realities of the computer industry.

Recognizing the commercial realities, Japan, although generally providing authors with certain moral rights (but not the right of withdrawal), specifically adopted an amendment to its copyright law declaring that the right of preserving the integrity of a work shall not apply to modifications that are necessary to permit the use of a program in a particular computer or that are made in order to make the program work more effectively. At least one commentator on the Japanese law has concluded that "[t]hese limitations effectively abolish moral rights to the integrity of the work."[14] The United Kingdom also has enacted a specific exclusion for computer programs from its moral rights law.[15]

Perhaps even more telling, France, generally regarded as the birthplace of moral rights, amended its copyright law in 1984 to provide that "authors who transfer the rights to their computer program can neither object to the adaptation of their

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[14] Hoffman, Grossman & Nawashiro, Moral Rights and Computer Software: An International Overview, 5 Computer Law. 9, 13 (1988).

[15] See Copyright, Designs and Patents Act of 1988, ch. 48, §§ 79(2)(a), 81(2).

software nor exercise their right of repent or repurchase."[16] It would be ironic if the United States, with its enormous stake in its computer industry, were to enact a law that was harsher than the law of France in enforcing authors' moral rights, thereby placing American companies at a disadvantage relative to their competitors in leading industrial countries.

II.

WORKS MADE FOR HIRE

Qualifying a work as a work made for hire under the Copyright Act is a related subject in that it is the determinative test for the purpose of determining authorship and copyright ownership.[17]

Two problems emerge as to which I would offer a comment.

First, there is a fair amount of uncertainty as to when a hired party may qualify as an employee under the general common

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[16] See id. at 10.

[17] The Copyright Act, 17 U.S.C. § 101, defines a "work made for hire" as

> "(1) a work prepared by an employee within the scope of his or her employment; or
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> "(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

law of agency, making the employer the author and the owner of the copyright for the work produced.[18] In the recent Supreme Court decision in Community for Creative Non-Violence v. Reid,[19] the Court set forth "a non-exhaustive list of factors relevant to determining whether a hired party is an employee," listing thirteen items no one of which, the Court said, was determinative. The uncertainty is greater because, in case of dispute, one result may be joint ownership with consequences that no party truly anticipated. As different kinds of hiring arrangements proliferate in our society, with more people working at home or according to individualized schedules, the uncertainty seems destined to increase. A measure of the alarm with which the current situation has been viewed may be seen from the article concerning the case in the New York Times, reprinted in The Arizona Republic under the headline "Copyright Ruling Could Cost Firms Billions."[20]

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[18] 17 U.S.C. § 201(b) provides:

> "In the case of a work made for hire, the employer or or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."

[19] 49 S. Ct. Bull. (CCH) B2790 (U.S. June 5, 1989).

[20] Arizona Republic, June 14, 1989, at E5, col. 3; see Copyright Ruling Opens a Costly Can of Worms, N.Y. Times, June 12, 1989, § D, at 12, col. 3. The lead paragraph stated:

> "A Supreme Court decision last week that expanded the rights of free-lance photographers, writers and artists to the ownership of their work has set the stage for a wholesale reassessment of the ownership of

The problem is exacerbated by the fact that, if it is determined that a work was not prepared by an employee within the scope of his or her employment as defined by the numerous criteria to be considered, the hiree gains an inalienable right to be considered an author of the work unless the work falls into one of nine categories and the hiree has agreed in writing that the work is to be treated as a work made for hire.[21] Some of those categories are quite general and cover many kinds of works (e.g., a work commissioned for use as "a contribution to a collective work, as a part of a motion picture or other audio-visual work, as a translation, as a supplementary work [or] as a compilation"). However, the consequences of a work such as a computer program falling outside any of those categories are so enormous that I would strongly recommend clarification by explicitly adding computer programs as a tenth category as to

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billions of dollars in reproduction rights, copyright experts say."

[21] Before the 1976 Act, it had been accepted that all rights under the copyright law could be alienated by the author through assignment. Even if the work was not yet in existence while the assignment was executed, an assignment was generally deemed effective in giving the assignee equitable title upon creation. See, e.g., T.B. Harms & Francis, Day & Hunter v. Stern, 222 F. 581, 582 (S.D.N.Y. 1915) (L. Hand, J.), aff'd, 231 F. 645, 647 (2d Cir. 1916); Buck v. Virgo, 22 F. Supp. 156, 157 (W.D.N.Y. 1938); see generally 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 10.03[A], at 10-36 (1988). To the extent that there were limitations on assignments before 1977, however, the 1976 Act made it even more hazardous for producers and employers to rely on assignments of copyrights. For a variety of reasons, copyright ownership by assignment does not equal authorship.

which written agreements to treat the work as a work made for hire will be enforceable.

Conclusion

The Congress should act with great circumspection in enacting any change to the copyright law which would add any burden to our copyright-based industries or interfere with contractual arrangements negotiated among persons participating in those industries. A useful and clearly warranted clarification would be the addition of computer programs as a tenth category of work as to which parties may contract for the work to be considered as a work made for hire.

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July 15, 1989

Dear Senator DeConcini:

Thank you for your letter of June 28. Attached are answers to the questions posed by you and by Senator Leahy in the attachment to your letter (noting that my answer will be later sent to Senator Leahy's Question No. 2).

Please note that the one suggestion I made in my testimony was for an amendment to the Copyright Act to explicitly add computer programs as a tenth category listed in 17 U.S.C. § 101(2). Accordingly, I may provide you with further comment in that regard after I have reviewed the bill recently introduced by Senator Cochran.

I will be pleased to try to be of service at any time.

Sincerely,

Jack E. Brown

Honorable Dennis DeConcini, Chairman
Subcommittee on Patents, Copyrights
and Trademarks
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

JEB:d

Enclosure

Jack E. Brown
Brown & Bain, P.A.
Phoenix, Arizona

SENATOR DeCONCINI'S QUESTIONS

QUESTION 1. As you pointed out, California, New York, and Massachusetts have enacted statutes extending moral rights to various artists under state law. Additionally, artists in these and other states can turn to state property, tort, commercial and unfair competition laws to protect their rights. But given the nature of our country -- where commerce across state lines is ordinary in business transactions -- do you see a need for uniform protection?

ANSWER: I think it would be appropriate, but probably not necessary in view of available state laws, to have a national law governing an artist's right to have his name affixed to any reproduction of his work (or preclude his name from being associated with a work not of his creation).

I think it would be appropriate, and probably necessary in most states, to have a national law to prevent unwarranted mutilation of an artist's creative work.

If there is ever any serious proposal to enact a law declaring a right of an author to withdraw his work when he decides it no longer represents his artistic vision (one of the so-called moral rights that, so far as I know, no one has proposed for

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adoption anywhere in the United States), I would also favor a national law re ecting such a right.

QUESTION 2. Since a great deal of the computer software produced in the U.S. is prod ced in California and Massachusetts, I would be interested in knowing if the existence of moral rights laws in those two states have adversely affected the creation and distribution of computer software in those two states as well as New York.

ANSWER: The California and Massachusetts laws do not apply to computer software (the California law deals only with "works of art or works of fine art" and the Massachusetts law deals only with "works of fine art"). Thus, although I do not know of any adverse effect on the creation and distribution of computer software attributable to the California and Massachusetts laws, no conclusion can be drawn from the absence of any adverse effect.

QUESTION 3. Many of the concerns you voice deal with the computer area, and I realize that your expertise is in that area. Do you think there is a risk that a statute extending moral rights to one group of artists or creators may lead to the extension of rights that will negatively affect the computer software industry or other copyright-based businesses?

Jack E. Brown
Brown & Bain, P.A.
Phoenix, Arizona

ANSWER: Yes.

I am not concerned that Senator Kennedy's bill, if enacted, would have that effect. There is a logical basis for distinguishing between the works protected by Senator Kennedy's bill and other creative works protected by copyright. For that reason, I am not opposed to enactment of Senator Kennedy's bill.

However, there is a much greater danger in enacting any law generally applicable to copyright-based industries and far less need for the enactment of a "moral rights" law granting inalienable rights to creators of works of greater complexity (in both creation and distribution).

Jack E. Brown
Brown & Bain, P.A.
Phoenix, Arizona

SENATOR LEAHY'S QUESTIONS

QUESTION 1. Are there any changes short of federal legislation that can be made to increase the protection given American artists?

ANSWER: Yes. I think many state legislatures would favorably consider the enactment of laws like that proposed by Senatory Kennedy's bill, following the lead of the California and Massachusetts laws against mutilation of works of fine art. Additional scholarly writing also would increase awareness of common law bases for protecting an artist's right to have his name affixed to any reproduction of his work or preclude his name from being associated with a work not of his creation.

QUESTION 2. In those European countries with moral rights laws, do judicial or governmental officials make subjective determinations about the content or value of visual art and whether the object in question is utilitarian?

ANSWER: I am making further inquiries in order to better answer this question and will provide an answer when those inquiries are completed.

Jack E. Brown
Brown & Bain, P.A.
Phoenix, Arizona

QUESTION 3. What comments do you have concerning the provision in Senator Kennedy's bill that allows judges or other triers of fact to determine whether a work of art is of recognized stature? Do you believe that judges can make an objective determination on this point?

ANSWER: Determination of whether a work of art is "of recognized stature" is self-evidently subject to subjective factors which may lead to disrespect for the decisions made. It would be most unfortunate if the statute led to judges attempting to decide "what is art?" Cf. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (Holmes, J.) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. . . . The[] very novelty [of some works of genius] would make them repulsive until the public had learned the new language in which their author spoke"). However, there are many other determinations made by judges on a regular basis that are equally difficult and involve equally subjective factors.

Senator DECONCINI. Very good.

I'm going to ask Senator Kennedy to chair the hearing for about 20 minutes. I have to go to the Select Committee on Indian Affairs for the confirmation hearing of the new BIA Director.

Senator Kennedy, if you would let Senator Grassley introduce any opening statement and then proceed with the questions, I would be most grateful.

Senator GRASSLEY. As far as my opening statement, Senator Kennedy, I'm just going to put that in the record.

Senator KENNEDY [assuming chair]. Fine. It will be included in the record in its entirety.

[The prepared statement of Senator Grassley follows:]

SENATOR CHARLES GRASSLEY

OPENING STATEMENT

JUNE 20, 1989

I WOULD LIKE TO THANK SENATOR DECONCICNI FOR CONDUCTING THIS HEARING ON THE PROPOSED VISUAL ARTISTS' RIGHTS ACT, S. 1198.

I CLEARLY REALIZE THAT THE CREATIVE ARTS HAVE A CRITICAL ROLE IN OUR SOCIETY, AND I THEREFORE SUPPORT AND ENCOURAGE THE SKILLFUL CONSTRUCTION OF ARTISTIC WORKS. OUR CULTURAL HERITAGE HAS A PART OF ITS FOUNDATION BUILT BY THE CREATIVE, ARTISTIC MINDS THAT HAVE FLOURISHED IN THIS GREAT COUNTRY. INDEED, OUR ARTISTS REFLECT AND PRESERVE AMERICA'S HISTORY FOR NOW AS WELL AS THE MANY GENERATIONS TO COME.

THIS SUBCOMMITTEE AND THE FULL JUDICIARY COMMITTEE DID GIVE SOME CONSIDERATION TO THE VISUAL ARTISTS' RIGHTS ACT IN THE 100TH CONGRESS.

THIS BILL, ALTHOUGH SOMEWHAT CHANGED FROM LAST YEAR'S VERSION, INTRODUCES A NEW CONCEPT INTO OUR COPYRIGHT SYSTEM. AND THUS, WE SHOULD PROCEED CAUTIOUSLY AND MODESTLY.

THIS NEW CONCEPT -- KNOWN AS MORAL RIGHTS -- WOULD GIVE A CREATOR RIGHTS IN HIS WORK, EVEN AFTER HE IS NO LONGER THE COPYRIGHT OWNER. WHILE "MORAL RIGHTS" ARE RECOGNIZED IN EUROPEAN COUNTRIES, I HAVE SOME QUESTIONS ABOUT THE NEED TO IMPORT SUCH NOTIONS INTO OUR LEGAL SYSTEM. AFTER ALL, OUR UNFETTERED, FREE ENTERPRISE ECONOMY HAS BEEN HOME TO MANY CREATIVE TALENTS.

I DO, HOWEVER, NOTE SOME CHANGES IN THE BILL THIS YEAR. FIRST, THE COPYRIGHT OFFICE WOULD BE REQUIRED ONLY TO STUDY THE FEASABILITY OF A RESALE ROYALTY PROVISION. AND SECOND, THE DEFINITION OF PROTECTED ART HAS BEEN NARROWED SOMEWHAT.

THESE ARE, NO DOUBT, GOOD IMPROVEMENTS. BUT I DO LOOK FORWARD TO HEARING FROM THE WITNESSES AS TO THE FUNDAMENTAL NEED FOR THIS LEGISLATION.

ONCE AGAIN, THANK YOU MR. CHAIRMAN FOR HOLDING THESE HEARINGS AND I THANK THE WITNESSES FOR APPEARING TODAY.

Senator KENNEDY. I will ask the staff to keep the time for us as well, if they would, at 10 minutes.

Professor Damich, as an academic who has devoted a considerable amount of time and research to the study of integrity and attribution rights for artists, how do you think the United States compares in the protection that it offers painters with those of other countries?

Mr. DAMICH. It depends on what you mean by "other countries." Around 76——

Senator KENNEDY. Let's take Europe generally.

Mr. DAMICH. I don't think it compares at all as far as moral rights are concerned.

The usual example that had been pointed out as a common law country was the United Kingdom, but there is a new British copyright act that has enacted comprehensive moral rights protection. So in my estimation and knowledge, the United States does not compare favorably with Western European nations.

Senator KENNEDY. As I understand it, there are nearly 70 other countries that provide these basic rights of attribution and integrity for their artists. Does that sound about right to you?

Mr. DAMICH. Yes.

Senator KENNEDY. Do you believe that this legislation, the bill that we are considering this morning, will improve the status of artists?

Mr. DAMICH. Certainly.

Senator KENNEDY. Maybe you could expand on this issue. As I understand it, under existing law the courts have not generally developed the kinds of protections which would be achieved by this legislation. Is that correct?

Mr DAMICH. Yes; that's correct. In my written statement I point out that the principle on which moral rights is based is found in American law. An example would be the right of privacy; in other words, protection of the right of personality in general, but in particular the protection of the creative personality with which the bill is concerned has not been expressly recognized in American

common law. In my previous writings, therefore, I have pointed out that it is possible to use the interest of the right of personality, which has been recognized in American law, eventually to develop moral rights protection. This has not yet happened. I don't see any positive signs of this happening, and therefore I think there is a need for moral rights legislation, especially with regard to the visual arts.

Senator KENNEDY. Senator Hatch.

Senator HATCH. Thank you, Senator Kennedy.

Professor Damich, American consumers have access to an extraordinary variety of copyrighted materials. The industries that produce copyrighted magazines, records, newspapers, TV shows, computer programs, movies, et cetera, et cetera, are all thriving in this country. All of these industries employ visual artists, whether as illustrators, decorators, designers, whatever.

While many American industries are struggling to fight foreign competition, the American copyright community is generating a $13 billion balance of trade surplus.

I think what I'm saying, Professor, is that you have studied moral rights laws in European countries and communities, and as far as I can tell those European nations that have enacted the strongest moral rights laws find their own copyright communities in a state of decline. Why should this committee entertain legislation that might restrain the very industries that make America the world's leading exporter of copyrighted material?

Mr. DAMICH. Well, I think it remains to be seen whether or not the reason for decline can be related to moral rights protection. In France, for example, moral rights was first recognized in 1902; in the early part of the 20th century France was a leader, as far as the visual arts are concerned.

I think that you make a very good point, and I have to agree with Professor Gorman about the approach to comprehensive moral rights protection meaning "across the board" with regard to every medium. My impression was—and I think the Visual Artists Rights Act bears this out—that Congress would move in an industry-by-industry approach, because I think there are important factors in the case of music and entertainment and publishing, as Professor Gorman pointed out, which are not the case with visual arts.

But it seems to me that the essence of the Kennedy bill is the protection of paintings, drawings, and sculpture from actual physical changes which would, in effect, cause the loss of that particular work of art. I think, focusing in on the Kennedy bill, I see no problem with moral rights protection.

Senator HATCH. So you would limit it just to that area?

Mr. DAMICH. Well, the Kennedy bill limits it to this area. I think that is the essence of moral rights protection, but with sufficient study I would be in favor of extending it to other areas.

Senator HATCH. Mr. Gorman.

Mr. GORMAN. I haven't had an opportunity to examine the most recent version of the Kennedy bill. To the extent, as Professor Damich says, that it limits or focuses its concern to the destruction or mutilation of singular works of art, which would possibly create the risk that those works would be removed from view in their original form, I very strongly support the legislation.

What gives me concern——

Senator HATCH. Who wouldn't, under those very narrowly prescribed parameters?

Mr. GORMAN. That's right.

I would hope that the legislation does take account, however, of the proper utilization of works of art in other media. For example, in news reporting, the recently enacted British moral rights legislation does have an exception to the integrity right in connection with the reporting and dissemination of news.

I would also hope that the Kennedy bill would have some kind of concept of fair use whereby the artwork of another person could be reproduced for purposes of discussion, analysis, and criticism.

Senator HATCH. Well, Professor Gorman, would you characterize the rights that would be created under the draft bill—the Kennedy bill—as moral rights, the bill that you're familiar with?

Mr. GORMAN. On the basis of earlier versions of the Kennedy bill and earlier sessions of Congress, I would.

Senator HATCH. Would these new rights, in your opinion, be included within the "exclusive right to writings and discoveries" as mentioned in article I, section 8 of the Constitution?

Mr. GORMAN. Well, they would be to the extent that the artist retains the copyright. If the artist were to retain the copyright, then there is protection against mutilation and distortion and modification already given by the copyright laws. But if the artist transfers copyright, then the rights given under the Constitution go to a third person and the artist would be able to assert those rights only if provided with an independent basis in moral rights law.

Senator HATCH. Let me just ask this question. I understand, Professor Gorman, that you have examined the history of how similar moral rights laws have operated in other countries. Do you really believe that those same laws can be exported to our country and into our legal system with good effect?

Mr. GORMAN. Well, I do have some concern in that regard. An examination of the application of moral rights laws in other countries shows that for the most part, accommodations have been made. Moral rights have not been applied in a strict and all-embracing manner. There have been adjustments within particular industries. Courts have generated a whole host of exceptions to moral rights.

Were a comprehensive moral rights law to be enacted in this country, I am fearful that without the importation of a variety of very nuanced exceptions that have been developed through decades in Europe, such an enacted law in this country would go too far to disregard the interests of the public and of users of such works.

Senator HATCH. Mr. Brown, I didn't mean to ignore you. I would be interested in any of your comments on these questions that I have asked.

Mr. BROWN. I think the answers Professor Gorman gave are answers with which I would associate myself. I would add an additional comment.

I don't think we ought to underrate the extent to which courts of the United States, notwithstanding the view which you expressed earlier which I understand, do sometimes do things which make

sense. In this particular field we do have a law of unfair competition; we do have a law of tort and common law, generally, and contracts, which the courts have utilized in effect to protect the rights of authors in many situations, which the bill aims to protect as well.

There are cases where artists have entered into contracts to protect their work from being reproduced or used in a manner that the artist would find not to his liking. Those contracts have been enforced. There have been situations where the courts have weighed the rights of the parties and implied obligations on the part of the party that commissioned the work. There have been other cases where they have relied on the law of unfair competition to say that this particular copyright owner, by virtue of assignment, is taking unfair advantage.

So it isn't as if we were totally without a law that protects creative endeavors.

Senator HATCH. Well, let me just ask one last question, then go back to Senator Kennedy.

I would appreciate the comments of each of you today on the issue of transferability of the rights granted under S. 1198. Section 3 of the bill, for instance, provides that the rights conferred "may not be waived or otherwise transferred."

Is this a wise limitation on the rights? Isn't it possible that visual artists and the art market in general would benefit from the free transferability of these rights?

Shall we start with you, Mr. Brown?

Mr. BROWN. Well, that's the provision that concerns me the most. That is what I intended to refer to.

The right of inalienability is premised, I suppose, on the notion that a particular group—in this case, visual artists—aren't able to protect themselves in contractual arrangements. I suspect that if we examine that more carefully with an economic study we would find that it is a lot less true than what is commonly supposed. People do make arrangements—for example, with respect to reproduction rights, which are protected under our present copyright act, and artists do make arrangements with the various persons to whom they may assign copyrights as to what changes may be made and what attribution shall be given. That's true, even in this field of visual rights.

I would agree that probably the most individualistic enterprise left in the world is the single artist in his studio, and therefore, more than any other business, he or she may have less bargaining power. But even in that situation, reputations are quickly built today in this art world, and artists with reputations have a considerable capacity to protect themselves by contract.

When you begin by saying that something is inalienable, and the Government says that you can't make contracts by arrangements for yourself no matter how much is paid, you are entering a force into the marketplace, the consequences of which are not entirely predictable. I certainly would fear any such thing in any other industry, but even in this one I suspect it is not needed and would have some adverse consequences somewhere down the road that would have to be ameliorated, either by judicial interpretation or by Congress then looking at it again.

The general notion, as I say, is that you should have right of attribution and that you should have a right to see that your work is fairly named and is not mutilated, and no one is going to quarrel with those as such, and I don't think State laws would quarrel much with those today.

Mr. GORMAN. I would like to endorse the comments of Mr. Brown and reinforce his point by making two observations.

First, despite the rhetoric in Europe about the nonwaivability and inalienability of moral rights, my research leads me to believe that it is not at all uncommon for creative authors to waive their moral rights simply by choosing not to enforce them. This is more common than one would ordinarily glean from the theoretical literature.

More significantly, I think that in this country to forbid transfer or waiver would have some troubling aspects. I can think of two situations. A contract between an artist and a book publisher, preparing a book on the history of art or the criticism of contemporary art—it seems to me that there is a value in having that work of art reproduced. It is questionable, once having made a contract permitting such reproduction, that the artist ought to be able to step forward and say "You haven't reproduced my work just quite accurately with the integrity that you should have."

And similarly, in a related manner, museum reproductions—it seems to me that an artist should be able to authorize museums to reproduce the artist's work.

It seems to me that too much emphasis on nonwaivability disregards the interest of the public in the access to and the dissemination of works of art.

Senator HATCH. Professor Damich.

Mr. DAMICH. Yes, Senator. There are a lot of points to address here.

I want to point out first of all that my remarks generally should be construed in terms of the visual arts as opposed to other media.

It seems to me that one of the best features of the Kennedy bill is the fact that it does not provide for assignment or for waiver. As I point out in my written testimony, this does not mean that the artist cannot consent, and I think that the distinction here is between a contractually enforceable waiver and consent. I think that an artist can consent, but should always have the right to revoke his consent until such time as the other party has detrimentally relied.

I think that if you do not have the prohibition of waiver and assignment in the bill, then the bill is next to useless. The bargaining power of artists is not strong except for those people who have established national reputations. The United States has accepted this principle in the copyright law itself where, in the section dealing with the power of termination, the power of termination is expressly held to be inalienable. The legislative history of the power of termination indicates that the reason for that provision was because of the lack of bargaining power of the author.

With regard to the examples that Professor Gorman brings up, he is absolutely correct in indicating that, for example, despite the fact that in France the French law of March 11, 1957, says that moral rights are not alienable; in fact they are alienable in prac-

tice. But the examples that he chooses, or the examples that I have seen with regard to waiver in France, have all regarded the adaptation right. I am not aware of the existence of many formal contracts as opposed to tacit consent, which Professor Gorman mentioned. I am not aware of any formal, enforceable contracts whereby an artist has been held to a waiver to allow his work to be physically damaged. I have seen many contracts where—in the adaptation right, for example, of a novel to the screen, that moral rights have been qualified to some degree.

The second point is Professor Gorman's indication of the problem of publication, and he focuses in on reproduction. Insofar as we are concerned with the Kennedy bill, the Kennedy bill does not deal with reproductions in that sense. There is a clause dealing with reproductions of limited editions of 200 or more, which would not include your mass-produced journals, like Time magazine. I think it might be important to look at the right of reproduction at some future time, but I don't think it's an apt criticism of the Kennedy bill.

I would just like to make one other comment about what Mr. Brown said about current law being adequate. I am not aware of any cause of action that would prevent the owner of a material object of a painting and the owner of the copyright of a painting to physically mutilate it, and to be liable. I am not aware of that and I would like to know what his citation of authority would be for that.

Thank you.

Senator KENNEDY. I don't know if there is any further response by any of the other panelists.

Quite frankly, I think that in the summation we covered a good many of the points that I was interested in addressing. I think there is general recognition by the members of the panel that there is a uniqueness that comes from creative works by painters and sculptors—the work is the creation of one individual, and the created object is also unique. In that way I believe visual arts separates itself from other creative work. It does seem to me that the visual arts are distinguishable. The real question is whether there are adequate types of protection. In our next panel we are going to find out whether there is a problem. If there isn't a problem, then we should consider the legislation one way. If there is a problem—and I think the case has been made that there is—then we should consider the appropriate response to protect those particular rights.

Mr. Damich, I think you have probably addressed this question. The way I understand it, you have the Rauschenbergs and the Wyeths and the others who would be able to negotiate a contract and do anything that they want. But we're talking also about another whole generation of younger painters, many of whom end up being very famous later on. As you point out, those younger artists are not in a strong bargaining position. And we will shortly hear some examples of how works of art by these artists have been mutilated. So I think you have addressed that key issue.

The waivability is another critical aspect of the legislation which you have addressed. Do you have any further comment?

Mr. DAMICH. I just want to mention that I have already seen contracts—people are already gearing up for the possibility of moral rights—I have already seen contracts which contain boilerplate of the total waiver of all moral rights, which is exactly what would happen if the waiver provision were left in the bill. Actually, it is happening now, before the bill is introduced.

Senator KENNEDY. Well, I appreciate that observation very much.

As I understand it, Mr. Brown, your principal area of concern and expertise is software?

Mr. BROWN. Yes. We do some work for broadcasting and print, but primarily I am focused on software with which I have considerable familiarity because it illustrates the points.

Senator KENNEDY. But I gather that it is less applicable in terms of the visual arts?

Mr. BROWN. As I said, I think that the visual arts probably represent the last area where work is done by an individual, all by himself; there is no collaborative effort. You don't have the same kinds of problems. But, of course, you may have similar problems in connection with the distribution or publication of something.

I must say that your bill recognizes that in limiting it.

Senator KENNEDY. That's what we are attempting to do in this legislation, and I think, Mr. Gorman, you mentioned in your earlier testimony the uniqueness of the individual creativity of arts in sculpture and painting, and further that some of the terms which you described are certainly less applicable to the visual arts as I understand it.

Mr. GORMAN. Very definitely so.

Senator KENNEDY. Thank you very much.

Senator Grassley, do you have any questions?

Senator GRASSLEY. Yes, I do.

Let's look at this subject of waivability from the standpoint of a young artist who is trying to get started and maybe needs to sell his work and wants to get going, as opposed to a more mature artist who is well-known and who accepts restrictions on his work.

Why should Congress get in the middle of negotiations by private parties, particularly when you're talking about people who want to just get started? They want to become famous artists.

Mr. DAMICH. As I said before, Senator, it's possible for the artist to consent to a physical change to his work. The question is whether this consent would be irrevocable for all time. That is linked to the concept of moral rights as a right of personality. In other words, I think that one has to distinguish between rights that can be commoditized and sold, and rights that cannot be. I think that in its history the United States has recognized—I think you can see this from the Constitution, the Declaration of Independence, and from the civil rights acts—that certain rights cannot be sold because if they were to be sold it would be such an offense against the dignity of the individual that we would not permit it. And I think the proper context in which to look at moral rights is in that context, that the personality of the artist is embodied in the work and that it is in his interest to protect him against any contractual waiver to allow that sort of thing to happen. He should always be able to second-guess his choice.

Senator GRASSLEY. Even if you put his future on the chopping block?

Mr. DAMICH. Yes. I think what it comes down to in economic analysis is simply a question of marginality. In other words, if a patron would insist that the artist waive his moral rights in order to purchase a particular piece, it may be a disincentive for that artist not to produce, but I think you would find that that would really be on the margin and would not affect the artistic productivity in general in the United States.

Senator GRASSLEY. Well, it just seems to me that the early life of an artist is a very tough life. I'm not an expert on it, but that's the perception I have. I just think it's very tough.

Mr. DAMICH. That's true, Senator.

Senator GRASSLEY. And to some extent we are standing in the way.

Any comments from either of you two?

Mr. GORMAN. Although I ordinarily believe that the marketplace ought to operate and that there ought to be a determination of rights and duties through negotiated arrangements, I do believe that if moral rights for artists are limited to rights against the mutilation or distortion of the unique physical object that that person has created— first of all, it is highly unlikely that a purchaser is going to want to do that. And second of all, it seems to me appropriate in those circumstances—a very narrow range of dysfunctional activity by a purchaser—it seems to me that is the one area where it is possible to argue that nonwaivability ought to prevail.

I don't see young artists losing out much financially if they were forbidden the right to transfer this power to another person who is not likely to want to use it.

Mr. BROWN. Senator, the fact is that if a young artist is given an opportunity to do a mural, he is going to be willing to give up whatever rights are provided by any bill that Congress would enact for the opportunity to have that mural appear. And if the person commissioning the mural says "I may want to change it later; I may want to add something by a famous artist; I may want to change the color of the statue; I may not want to have the metal be rusting, and I may want to have it painted or repainted, and I want you to sign away your right," he's going to sign it.

It seems to me that making it inalienable is not necessarily in his interest. It certainly is nothing any of us are going to support, to argue that someone should be allowed to mutilate a work. As I say, I think the courts may well take a dim view of any kind of mutilation if there is any kind of implied contract that can be found in a situation like that. But there are all kinds of changes which may properly be the subject of contracts, it seems to me, that are unpredictable in advance. I don't know that it's going to have an economic effect on the production of the young artist or his welfare, but I don't know that it's going to do him a lot of good, either.

Senator GRASSLEY. I'd like to have you look at how this provision of not being able to waive rights operates in conjunction with the work for hire exemption. If an artist is commissioned to do a piece of art, then wouldn't the person who hired the artist have full

rights in the artwork and wouldn't the artist be precluded from asserting moral rights?

Mr. DAMICH. According to the Kennedy bill there is an exclusion from work for hire, so that moral rights would not apply to either party—that is, the commissioning party or the employer, or to the employee or the commissioned party.

Senator GRASSLEY. So you're saying that there is no problem?

Mr. DAMICH. There is no problem in the Kennedy bill, yes.

One of my criticisms of the Kennedy bill is that I think the work for hire context should be looked at a little more closely to see whether moral rights in fact can fit into that context as well, but I think some study has to be done to see if that is the case.

Senator GRASSLEY. This will be my last question.

Last year we studied the Berne Copyright Treaty, and we heard from many witnesses about the extensive protection that American law already affords artists. Many of these experts on that legislation told us that Federal and State laws concerning tort, contracts, trademarks, just to name a few, give artists ample legal rights and remedies.

So why do we now find ourselves in the position of considering the addition of further protections if we already have the equivalence of moral rights? Has anything changed or happened in the last year to warrant this major change? I suppose that if you agree with that first premise, then you would say that nothing has changed in the past year.

Mr. DAMICH. Like a law professor, the response would be a distinction. I was involved in the hearings in the House on the Berne Convention, and I think that it has to be made clear that the point of many of the experts—and I did not agree with this, although I did agree in principle—the point regarding joining the Berne Convention was, given the fact of the degree of moral rights protection in the other countries of the Berne Union, and given the fact that the Director of the World Intellectual Property Organization was not going to oppose U.S. entry, that it was OK to join the Berne Convention on that basis. But I think that if pressed, the experts would say that American law in fact does not reach the level of protection of the language of article 6bis of the treaty.

So it's one of those things that, "Yes, we probably could join the club, but we have to admit that we don't really fulfill all of its rules." That's my position.

Mr. BROWN. In fact, very few countries do. That's another point that was made in the hearings.

Senator DECONCINI [resuming the chair]. Thank you, Senator Grassley.

Mr. Damich, you answered a question of mine. In your statement you make the argument expressly, which was rejected by this committee and the Congress as a whole, namely, that express moral rights in our copyright law were required by Berne, and I think you have cleared that up. You feel we are in compliance with Berne by passing an implementing statute, but we could be more in compliance if we had addressed moral rights.

Is that a fair summation?

Mr. DAMICH. It's better to say that we could join Berne and point to the traces of moral rights protection that we have as evidence of

our good faith, but I would emphasize the fact that in my opinion, U.S. law does not comply with the requirements of article 6bis, which is the moral rights provision. I think it's scandalous, as a matter of fact——

Senator DECONCINI. Then you're saying that in your opinion we are not part of the Berne Convention? We have not adopted the legislation necessary to be in compliance? What we did last year really doesn't put us in any better position than if we passed nothing?

Mr. DAMICH. As far as the actual law is concerned in the United States, there has been no change, that's correct.

Senator DECONCINI. And consequently, we are in no better position regarding the Berne Convention than if we had passed no laws?

Mr. DAMICH. That's correct, regarding the Berne Convention. I think, though, with regard to moral rights, the joining of the Berne Convention was the first official recognition of acceptance of the principle of moral rights that I am aware of, other than the Gilliam case.

Senator DECONCINI. So we joined it but we didn't pass the implementing statutes to be subject to it? I'm trying to understand how we can be partly there but not all the way.

Mr. DAMICH. Senator, I guess that's a question to ask politicians rather than academics.

I think that it was basically a political decision, that the other countries of the Berne Union wanted the United States to join, and that they would be willing to accept these traces as sufficient compliance to join. But I think if you asked them now, they might say they would appreciate very much, as Britain did, if we would change our law to come into more full compliance with article 6bis.

Senator DECONCINI. Very good. So what you're saying is that we're in, but they would like us to be more pure about it and address moral rights in passed legislation?

Mr. DAMICH. It's fair to say that, yes, sir.

Senator DECONCINI. Fine.

Also you say in your statement that "moral rights will help protect our cultural heritage," and then you don't give any explanation. Can you give me just a quick explanation of how that is going to be?

Mr. DAMICH. Yes. There is an indirect correlation between preservation of our cultural heritage and moral rights. Moral rights are artist's rights, and therefore it is up to the artist to assert them or not. So in that sense it is dependent on his or her activity. It's not as if we were talking about a landmark statute, for example, where another Government entity might come in and say "No, you can't change that work of art."

But although it is indirect, I think it is a very real benefit of moral rights protection because I would assume that in most cases the artist would want the integrity of his work protected, and therefore would sue if he had the cause of action.

Senator DECONCINI. Mr. Brown, in your statement you indicate that the successful creation and distribution and communication of artistic material is "dependent on economic viability or optimum business arrangement." But isn't much art created just for the pur-

pose of creating art and no other reason? And don't many artists create their work not for any business reason, but in order to fulfill their artistic or emotional vision and the experience that they feel within?

Then I would ask you whether it is proper to apply business and economic principles to what, in some cases at least, and perhaps many cases, are nonbusiness, noneconomic endeavors? Are artists really businessmen or are they both artists and businessmen? How do you resolve the two? I understand where you come down on it, but I would like your explanation.

Mr. BROWN. Well, most artists who create things for their own pleasure or to fulfill their own sense of destiny and who have no business purpose or objective don't transfer ownership of their work and don't assign copyrights or enter into arrangements for the sale of their works, so there isn't any problem. They are the owners; they have it; if they give it to a friend, they don't necessarily transfer the ownership or the copyright. If they let a museum show it, there isn't a transfer of ownership or copyright. They're not in the business, so you have a nonproblem.

There is a business, however, and a considerable one in which artists are engaged, and the business involves not just the production of a work but, as Senator Kennedy's bill recognizes, reproduction of that work, distribution, sale, resale, auctions which frequently appear on the front page of the New York Times—those are all arrangements downstream from the creation that are subject to the making of contractual arrangements. Indeed, there are contractual arrangements in almost all these cases.

The least restrictive is the single work of art being sold in a gallery because usually that is put there only on consignment and there is no transfer until somebody buys the work and takes it home or puts it in a museum or whatever he does with it.

I hope that addresses your question.

Senator DECONCINI. Mr. Gorman, do you want to comment?

Mr. GORMAN. The question you raise is also at the root of our copyright system. It might be argued that economic protection through copyright is not necessary for artists and composers because they are moved by their own internal spirit to paint and to compose. But the truth of the matter is that our society is enriched when these people do not simply paint and compose, but when their works are disseminated to the public. The process of investment in the arts, distribution of the arts to the public, is what we feel we need an incentive for through our copyright law.

I am somewhat concerned—this is a reiteration of my basic point—that too-aggressive protection of moral rights in fields other than the visual arts, such as book publishing, magazine publishing, film, television, and the like, may unwantedly serve as an inhibition upon the development and dissemination of works to the public by virtue of the capacity of any one of a host of individuals to interpose his aesthetic values to prevent the exploitation and marketing and distribution of the work.

Senator DECONCINI. Thank you.

Senator Kennedy, do you have any other questions?

Senator KENNEDY. Just the last point. The way this legislation is written, of course, is that the individual artist doesn't necessarily

have to bring any cause of action if there is change to their painting unless they feel there is sufficient reason from their own point of view as an artist.

There are those who are concerned that if we pass this legislation, if there is any kind of alteration or change, that we're going to subject people downstream to limitless number of cases. I think this concern has been well addressed considering the fact that we're not giving the Justice Department the power to sue, as we do in civil rights cases; it is only given to the individual, and it's up to the individual to decide whether he or she feels sufficiently morally concerned or outraged to move ahead and take that action. The reason the rights are created is the recognition that there is something of the individual that is ongoing and continuing which is a part of that work of art.

It seems to me that if we look at it in that way, then there is ample justification for that right. If we're looking at it as just another pair of shoes or something, we're never going to be able to deal with it.

Mr. DAMICH. I agree with you, Senator Kennedy. I think that goes to the consent point that I was trying to make, also. You said that it is up to the artist whether or not he would even bring the suit, and I think that is another way of expressing that the artist can consent.

The question, though, is whether or not the artist can withdraw his consent. I think that the artist should be able to withdraw his consent up to the point where the action is taken, but I don't think it is proper for him to say "Yes, you can change that on my mural," then when the owner of the mural has made the change, for him to come back and say "Oh, I didn't mean it that way." But that is to be distinguished from a situation where the mural is created at the very beginning, as Mr. Brown was pointing out, and the owner of the would-be mural says "I want you to waive your rights now for all time so that I can do whatever I want with this." I think an artist should not be contractually held to that kind of thing.

Senator KENNEDY. Very good.

Senator DECONCINI. Thank you very much, gentlemen. It has been very interesting and very helpful.

We will now have our final panelists: Ms. Linda Cawley, on behalf of Peter H. Karlen, a practicing attorney; Mr. Tom Van Sant, an artist from Santa Monica; and Mr. Marc Wilson, director of the Nelson Atkins Museum in Kansas City. I am advised that Mr. Karlen is not here because of an illness in his family.

We will start with you, Ms. Cawley. If you will summarize your statements in 5 minutes or less, we will put the full statements in the record.

You may proceed.

STATEMENT OF LINDA CAWLEY, ON BEHALF OF PETER H. KARLEN, ATTORNEY AT LAW, LA JOLLA, CA

Ms. Cawley. Mr. Chairman, my name is Linda Cawley and I am an associate of Peter H. Karlen of La Jolla, CA. I apologize on

behalf of Mr. Karlen for his absence today, but Mr. Karlen's father is seriously ill and he is scheduled for emergency surgery.

I practice with Mr. Karlen and have been involved in all of the artists' rights cases Mr. Karlen has handled during the time I have been with his firm. With your permission, Mr. Chairman, I would like to submit Mr. Karlen's written testimony for the record.

Senator DECONCINI. Without objection.

Ms. CAWLEY. Thank you.

Our firm has probably handled more artists' rights cases under the California Art Preservation Act than any other firm. As a practitioner familiar with artists' rights litigation, I am grateful for the opportunity to testify in support of the Visual Artists Rights Act of 1989. I commend you for holding this hearing on this important subject and hope that I can answer any questions you may have.

I also hope to demonstrate the need for this legislation by relating to you some of the experiences of our clients, who have seen their works of art mutilated and destroyed.

Finally, I also hope to convince you, Mr. Chairman and members of the committee, that legislation similar to S. 1198 currently protects artists in nine States without causing a rash of litigation or proving too complex for the courts.

First, there is a critical need to protect visual artists. Unlike composers, writers, film directors, and computer programmers, whose works exist in multiples, the creator of a unique original depends upon the continued existence of the original to protect and enhance his reputation. Fine artists live and breathe reputation.

The threat of mutilation, destruction, or distortion of works of fine art is a real threat which not only affects the reputation of artists but also threatens the loss of our cultural heritage. I would like to give you a few examples of some of the cases we have handled and observed since enactment of the California statute in 1980.

Last year a development company threatened to tear down several historic Mexican-American murals. As in your State of Arizona, Mr. Chairman, Mexican-American art is a vital part of the culture of all western States, especially in California, and many residents in the area protested the destruction of the murals. These early 1920 murals, which depicted Mexican-American life in the Southwest in the 1920's, are typical of murals found throughout the region. Thanks to the California Art Preservation Act, the company made the effort to determine whether the murals were removable. Fortunately, it was discovered that there is a new technique which allows murals to be removed from walls without destroying or harming the art work. The murals were saved.

In another case Monette Kupiec, a regional artist, saw her most notable work—a widely regarded mural in the Hotel Del Coronado—wallpapered over. The mural depicted life at the hotel in 1904. It was displayed on the wall of the hotel's Grande Hall, where thousands of guests enjoyed the painting each year.

As you and I know, Mr. Chairman, the Southwest is rich in history and culture. For over 10 years Kupiec's mural conveyed this sense of history until it mysteriously disappeared. The artist brought suit under the California statute and learned that her work lay beneath a layer of glue and wallpaper, and had thus been

destroyed. An important statement of our heritage was lost. The artist collected damages under the California statute, but equally important, the case put all Californians on notice that such destruction of art is against the law.

These examples are typical of the injury to artists which has been occurring in California and across the country for years. There is a real need for the Visual Artists Rights Act—not only to protect the work and reputation of artists but, in the words of the California Preservation Act, to protect "the public interest in preserving the integrity of cultural and artistic creations."

Second, S. 1198 is limited and will not have any harmful effects on user groups, such as the publishing trade and entertainment industry. The principal effect of S. 1198 will be on those who believe that they have the right to destroy, alter, or mutilate a work of art or deprive an artist of credit.

Third, the visual artists rights bill is not revolutionary but evolutionary, and draws on the experience of the States. Our experience in California and the experience in other States demonstrate that artists' rights statutes do not cause increased litigation and are not too complex for the courts to handle.

Fourth, the Visual Artists Rights Act correctly creates a national, uniform standard to protect artists and their work. Under a Federal statute artists, collectors, and all those involved will know their rights and obligations no matter where they buy or sell a work of art.

Uniform legislation is necessary and appropriate. An artist shipping works in interstate commerce should not have to worry about any conflict in State laws.

Finally, Mr. Chairman, there are some aspects of the bill with which we are not in total agreement.

First, for a number of years we have advocated expanding the coverage of artists' rights statutes. The problem is that many works of fine art simply cannot be categorized as paintings, sculptures, drawings, prints, or photographs, such as collages or mosaics.

Second, we do not support the full inclusion of a fair use defense as applied to artists' rights, but rather support limiting the application of the fair use defense to cases where the user needs to repair or restore the work.

In conclusion, as an art law practitioner I support the Visual Artists Rights Act. The bill is narrowly drafted legislation designed to protect artists and promote art preservation while minimizing the impact on user groups. If anything, the drafters of the bill have leaned over backwards to accommodate user groups by restricting the scope of the subject matter covered and by imposing the requirements of recognized stature and prejudice to honor or reputation, and allowing the fair use defense.

[The prepared statement of Mr. Karlen and responses to additional questions follow:]

28-054 - 90 - 4

STATEMENT OF PETER H. KARLEN

ATTORNEY AT LAW

La Jolla, California

Before

SENATE SUBCOMMITTEE ON PATENTS, COPYRIGHTS, AND TRADEMARKS

HEARING ON S. 1198

THE VISUAL ARTISTS' RIGHTS ACT OF 1989

June 20, 1989

SUMMARY

The principal virtues of the bill are that it: (1) creates through Section 301 of the Copyright Act, uniform law throughout the United States where there is now diversity, a uniformity which will promote the transfer of artworks through interstate commerce; (2) promotes "progress in the arts" by preserving for posterity the physical integrity and correct attribution of existing works, all in the interest of preserving the cultural heritage; (3) effectuates the copyright laws by ensuring that artist-copyright owners can exercise their rights under copyrights by preserving unique originals; (4) protects artists' reputations, which are their principal assets; and (5) meets an existing need since for visual artists the rights confirmed by this legislation are violated more than traditional copyright rights.

The bill is narrowly drafted to protect visual artists and their works. Except that users cannot gratuitously mis-credit, mutilate or destroy works of visual art, this legislation should have a minimal effect on user groups. It will not significantly impede transfer or sale of works in interstate or foreign commerce. After all, similar laws in New York, California, Massachusetts, other states and in Europe have not had that effect.

In fact, the bill is so restricted that the artists' rights should be broadened in certain respects via amendment. Coverage should be extended to all works of "fine art" rather than confined to paintings, sculptures, drawings, and prints; the fair use defense, at least envisioned under Section 107, should not necessarily be applied to these rights; and the owner of the rights should not necessarily have to prove prejudice to honor or reputation, although this prejudice should be considered for purposes of awarding damages.

The bill does not pose serious problems regarding privacy, either for artists or user groups, nor is it likely to create a flood of litigation because, as indicated by testimony supporting implementation of the Berne Convention, many of these rights already exist from state to state under unfair competition, privacy, and defamation laws. The only possible cause of increased litigation would be the fair use defense if allowed to apply to these rights.

The proposed law does not pose difficulties for the courts. Those concerned about adjudicating "recognized stature" have nothing to worry about. Most defendants, either for practical or legal reasons, never seriously raise the issue, and the typical artist pursuing her rights has an established reputation and creates clearly protectible works.

STATEMENT OF PETER H. KARLEN

HEARING ON S. 1198
THE VISUAL ARTISTS' RIGHTS ACT OF 1989

TABLE OF CONTENTS

		Page No.
	SUMMARY	1
	TABLE OF CONTENTS	2
I.	INTRODUCTION	3
II.	GENERAL COMMENTS IN SUPPORT OF BILL	4
	A. Overall Purpose and Benefit of New Laws	4
	B. Effect on User Groups	6
	C. Extension of New Law to Literary and Audiovisual Works	6
	D. This Legislation Will Work	7
	E. Litigation Effect and Other Potential Burdens	7
	F. Uniformity of Law	9
III.	SPECIFIC ISSUES OF CONCERN	9
	G. Privacy	9
	H. Reputation	11
	I. Waiver	13
	J. Subject Matter	14
	K. Fair Use	15
	L. Recognized Quality	16
	M. Destruction	18
IV.	CONCLUSION	19

I.
INTRODUCTION

Mr. Chairman, my name is Peter H. Karlen, and I am a practicing attorney in Southern California in the areas of art, literary, and entertainment law, and a contributing writer for *Artweek* and other arts publications. I have authored numerous articles, both trade and academic, on art law and the rights and liabilities of artists, dealers, art experts, and other persons in the art trade. My experience also includes years of teaching courses on law and the arts at law schools in both this country and the United Kingdom. Our law offices have probably handled more artists' rights cases under the California Art Preservation Act (Civil Code Section 987) than any other law firm.

As a practitioner familiar with artists' rights litigation, I am grateful for the opportunity to testify in support of the Visual Artists' Rights Act of 1989. I commend you for holding this hearing on this important subject and hope that I can answer any questions that you may have about how the proposed legislation and statutes like it work every day in law offices and courtrooms around the country.

I also hope to convince you, Mr. Chairman and members of the committee, that legislation like the Kennedy bill currently protects artists in a number of states, without causing a rash of litigation or proving too complex for the courts to deal with. Finally, I hope to demonstrate the need for this legislation by relating to you some of the experiences of our clients who have seen their works of art mutilated and destroyed.

II.

GENERAL COMMENTS IN SUPPORT OF BILL

A. OVERALL PURPOSE AND BENEFIT OF NEW LAWS

There is a critical need to protect visual artists. Unlike composers and writers whose works exist in multiples, the creator of a unique original depends upon the continued existence of the original, not only to exercise the copyright but to protect and enhance reputation.

Fine artists live and breathe reputation. The continued physical existence, especially of a publicly displayed work, greatly enhances the artist's reputation and provides a "living portfolio" of the artist's work for all to see. For similar reasons, the artist's right to claim credit preserves the artist's reputation. It does no good to preserve an artist's work if the artist can't claim credit for it. Similar considerations apply to the right to disclaim credit, another important artist's right. (See Karlen, "Artists' Rights Today," *4 California Lawyer*, No. 3, 22, 25, 54 (1984)) *

What most commentators forget is that "moral rights" actually effectuate artists' economic rights, including copyrights. Unless the work is created for hire or the artist transfers the copyright under Section 204, the artist remains the copyright owner. However, it does little good to remain the copyright owner if the unique original copy has been mutilated or destroyed by other persons with impunity and can no longer be properly reproduced.

In many cases we have handled, the most critical injury to the artist has been the loss of copyright rights because of destruction or mutilation of original artwork. (But see Karlen, "Moral Rights in California," *19 San Diego Law Review*, 675, 712, 231 (1982)) For example, in the Tompkins ** case, the artist had created well over one hundred sculptural works which had been

carelessly lost or destroyed at a museum where they had been deposited for safekeeping and display. The critical injury to the artist was that the sculptures, mostly models (which are not covered under this bill), effectively had their copyrights destroyed. The artist had planned to commercially exploit the sculptural works through public display, reproduction, and mass distribution.

Our practical experience has been that visual artists are not so much concerned with traditional copyright protection as they are with enforcing the rights mentioned at Article 6*bis* of the Berne Convention. For each case of copyright infringement involving a work of fine art, we see five cases involving potential violations of the California Art Preservation Act and other similar laws. (Of course, the reverse is true for commercial artists, whose principal complaint is copyright infringement.) It is usually not the fine artist whose work is reproduced on mugs, T-shirts, and other items, but rather the commercial artist, although there are exceptions to this proposition with artists who are peripherally fine artists.

Perhaps the most important reason for extending the copyright legislation is to follow the original constitutional authorization for such legislation at Article 1, Section 8, Clause 8 of the Constitution, which allows Congress to enact legislation "To Promote the Progress of Science and useful Arts." After all, this legislation not only serves the private interests of fine artists but also the public good. As enunciated in the preamble to the California statute written by state senator Alan Sieroty, one purpose is to protect the "public interest in preserving the integrity of cultural and artistic creations."

A society which adopts the motto "*ars brevis, vita longa*" rather than "*ars longa, vita brevis*," does not respect its cultural heritage.

In short, artist's moral rights as provided under this bill are a mark of civilization.

B. EFFECT ON USER GROUPS

A properly restricted law would not have any particularly harmful effect on user groups. The Kennedy bill before this committee is so restricted. It does not affect anyone in the publishing trade or entertainment industry, nor does it affect commercial art.

Its principal effect is on those who believe they have the right to gratuitously destroy, alter, or mutilate a work of art or deprive an artist of credit because they "own" the art object or because they want to make money from distorting or misusing it.

In my experience with the California statute, the only people who have strongly objected are those who cannot understand why the owner of a physical art object can't destroy it at will. (See Karlen, "Artists' Rights Today," 4 *California Lawyer*, No. 3, 22, 25 (1984))

In all my experience with the California statute, I have seen only one case which went outside the art trade. In that case, the artist had lent a painting to a film producer for purposes of having the painting appear in the background in one scene. The work was destroyed either accidentally or deliberately. However, this was not a case directly affecting the entertainment industry.

C. EXTENSION OF NEW LAW TO LITERARY AND AUDIOVISUAL WORKS

The drafters of this bill have wisely decided not to extend coverage beyond the "visual arts." Any comprehensive scheme extending moral rights to literary or audiovisual works would not be practical, would be comprised mostly of exceptions to coverage, and would be so fraught with complications that no one could enforce it. For example, joint authorship for works of visual art creates enough problems; thus, can anyone imagine dealing with the

complications involved with moral rights in collaborative works in the publishing and entertainment industries?

D. THIS LEGISLATION WILL WORK

We have directly handled or been involved with perhaps as many as 100 cases under the California statute (Civil Code Section 987). From our experience we see that the California law, restricted in scope, provides clear guidelines to attorneys as to whether there is a good case. Many claims can be discarded immediately because the statutory requirements are not met.

In our experience, when we find that a case has merit, the well-drafted California statute will usually yield a settlement in short order since there are few defenses to a claim of intentional violation. This narrowly drafted bill should achieve the same results.

E. LITIGATION EFFECT AND OTHER POTENTIAL BURDENS

We have no reason to believe that this bill, which is similar to the California law, will generate unnecessary litigation.

Even though we have often been involved in litigation, only one case, the Schnorr case, went to trial. (See Karlen, "Art Destruction: The Michael Schnorr Case," *Artweek*, March 28, 1987, 11; "Art Destruction: The Michael Schnorr Verdict," *Artweek*, October 31, 1987, 7) This was because the Schnorr case was a peculiar one not involving intentional violations. In Schnorr, the artist had purchased a protective coating for his murals guaranteed to protect the murals against atmospheric conditions and vandalism. However, the coating proved unsuitable for works of fine art, causing the works to crack and peel. The artist brought suit under the California Art Preservation Act (Civil Code Section 987) on the ground that the distributors were "conservers" of fine art

under subdivision (c)(2) who had exhibited "gross negligence" in not testing the product for art preservation. The artist did not prevail at trial under the Act since the defendants were held not to be art conservers. However, the artist won based on a products liability theory.

Litigation we have been involved with has not posed issues too complex for the courts. The Schnorr case, the most complicated case one could imagine, resulted in a trial judge making sensible rulings on all contested issues, e.g. on (1) whether sellers of art conservation statutes were "conservers" under subdivision (c)(2) of the statute, (2) whether murals painted on concrete walls were removable without harm, and (3) whether cost of repairs could be the measure of damages. There is already so much commentary in the law journals about the statutes that anyone can manage a case under any law established through this bill.

This legislation will not interfere with private sales or transfers. The sensible art collector will not refuse to buy a work merely because he cannot destroy it or miscredit it. Notwithstanding numerous complaints I have heard about Section 986 of the California Civil Code on resale royalties, I have yet to hear any serious complaint about the California Art Preservation Act (at Section 987), except for the lament that "if I own it, I can do whatever I want with it."

The only possible interference is with works intended for permanent installation. So long as some provision is made for this, e.g., in connection with works in buildings, purchasers won't be seriously affected.

Any collector who no longer wants to keep a work of art can sell it, return it to the artist, or donate it to a charitable organization rather than destroy it.

F. UNIFORMITY OF LAW

Artists' rights statutes are now in effect in many states, including the two most populous states, New York and California, where we find the nation's principal art markets. Moreover, as testimony showed in connection with the Berne Convention Implementation Act of 1988, artists' rights could be implemented through unfair competition, defamation, and invasion of privacy laws in effect throughout the United States. The question is, why not have uniform legislation? After all, the art market is a national and even international market. An artist shipping works in interstate commerce should not have to worry about conflict of laws or the vagaries of various state laws in order to determine what her rights are. This is one problem removed by this bill by applying Section 301 of the Copyright Act to artists' rights laws.

We have seen cases involving interstate shipments and uncertainty about application of various laws. For instance, we recently had two cases involving interstate shipments in which it could not be determined where the art destruction took place. If destruction occurred in California, then the artist had a remedy; if it occurred in another state not having similar laws, the artist's rights would be completely different.

III.

SPECIFIC ISSUES OF CONCERN

G. PRIVACY

One issue that arises is privacy. Collectors may fear that the new law might create an "art police" intent on finding violations committed in the privacy of one's home. The nightmare vision is that of an artist knocking on the door late at night demanding to see whether his work is still intact.

As a legal matter, this is not a serious concern. The bill itself makes a clear distinction between ownership of the artist's rights, the fixed work, and the copyright. (Section 106A(e)(3)) Moreover, even existing law makes a similar distinction (at Section 202 of the Copyright Act) between ownership of the fixed work and ownership of the copyright.

For example, under existing law, just because the owner has exclusive rights under Section 106 doesn't mean that he can exercise them if someone else owns the art object. Copyright ownership does not confer access to the original art object. A copyright owner can only *request* that the owner of the art object make it available for reproduction or other exploitation. (Naturally, the converse is also true; the owner of the fixed work has no right of reproduction as against the original copyright owner.) (See Karlen, "Worldmaking: Property Rights in Aesthetic Creations," *45 Journal of Aesthetics and Art Criticism* 183 (1986))

As a practical matter, the collector's privacy is not really an issue. Artists do not have the inclination, resources, or need to track the whereabouts and condition of all their works placed in private hands. Only an artist faced with the loss of a publicly displayed work is likely to pursue access if the work disappears or is mutilated.

For example, over the years, we have encountered only one case in which an artist had to demand access. In the Kupiec case, the artist had a painting on public display at a famous hotel. After the work mysteriously disappeared from public view, the artist inquired as to its whereabouts. The hotel told the artist that this information was no business of the artist, which naturally piqued the artist's curiosity. When it became clear that the work had either been destroyed or covered over, the artist brought suit and effectuated her rights under the California Art Preservation Act (Civil Code Section 987) by

procuring access through the court action. The work had been wallpapered over, thus destroying it.

We don't count the Browne case, involving the disappearance of a large, publicly displayed sculpture, as an *access* case since the artist's pursuit of the missing sculpture was certainly reasonable and within his rights.

II. REPUTATION

One issue is that the artist must prove prejudice to her "honor or reputation" with respect to distorted, mutilated, or modified works. (Section 106A(a)(3)(A)) A concern raised by artists' groups is that the artist's general reputation in the community could become an issue. E.g., suppose it is claimed that the artist has no reputation to protect?

However, the purpose is only to protect the artist's reputation and honor *as an artist.* If this is not clear by implication, then language should be added so that the honor or reputation protected is that "as an artist or other creative person."

The virtue of adding the term "honor," which does not appear in other state statutes, is that sometimes the artist may have difficulty showing prejudice to reputation; but certainly the artist's honor would be prejudiced by conduct that may not affect reputation.

Also, a virtue of using such language in the bill is to comply with Article 6*bis* of the Berne Convention.

An advantage of requiring the artist to prove prejudice to honor or reputation is that without such a requirement a violator (under the bill) would be encouraged to destroy a work because the artist has to surmount the burden of proving "recognized stature." However, there are reasons for not requiring the artist to prove prejudice to honor or reputation.

Under the California statute, the precursor of the Massachusetts legislation, the artist need not prove injury to reputation even though such injury may give rise to damages, as per subdivision (a) of the statute. It is enough that the work is defaced, mutilated, altered, or destroyed. (But see Karlen, "Moral Rights in California," *19 San Diego Law Review* 675, 712, 232-233 (1982))

As a practical matter, our cases have illustrated the problems in this area. Not every case is as clear-cut as the case of Max D. whose sculptures, considered evil by their purchaser, were subject to an exorcism ceremony conducted by the purchaser and his friends during which the sculptures were carved with crosses to purge their evil qualities. Clearly, this conduct was prejudicial to the artist's honor and reputation.

In Susan M.'s case, a purchaser was dissatisfied with the artist's work so he hired another artist to "improve" the work. His argument was that the modified work was actually an improvement which enhanced the original artist's reputation. (Of course, this conduct clearly reflected badly on the artist's honor and integrity.)

In the case of Elaine K., a municipality which had commissioned a large outdoor sculpture made what it considered a number of improvements on the painted sculpture, including a new paint job, approximately a decade after the work had been created. The artist wasn't pleased with the restoration performed without her consent, although the municipality argued that the changes actually enhanced the artist's reputation.

In some cases, to require prejudice to honor or reputation may actually nullify the integrity right.

I. WAIVER

The bill presently does not permit waiver. This stand certainly eliminates all the problems arising from joint authorship if waiver were permitted. For instance, if two or more authors create a work, who would have the right to permit another person to modify it? Would joint authors have to consent? Would all joint authors have to waive the attribution rights, or could one joint author waive his right to credit?

Preventing waiver obviously eliminates the problem of artists being coerced into abandoning their rights. This is an important goal.

However, an alternative is to provide for very limited waivers, as per the California statute (Section 987(g)) which prevents waiver by written instrument. (But see Karlen, "Moral Rights in California," *19 San Diego Law Review* 675, 714-16 (1982)) Nonetheless, if written waivers are permitted, a new waiver provision should accomplish at least the following objectives: (1) to protect artists from being coerced into granting waivers, and, if that is not possible, to require the beneficiary of the waiver to assume additional obligations (C.f. California law which requires commissioning parties who coerce work-made-for-hire agreements to become employers for purposes of various tax and benefit laws); and (2) to ensure that property, especially real property, containing works of fine art, remains freely alienable.

By requiring a *written* waiver, all transaction costs are shifted to the commissioning party. Moreover, that party has to be very careful in drafting the waiver language.

As illustrated by the Burton case, a written document drafted by the commissioning party's attorneys which provided for transfer and waiver of "all rights," including property rights, was held not to be an unambiguous waiver of statutory moral rights.

J. SUBJECT MATTER

The bill provides protection for paintings, drawings, sculptures, and prints. This represents a pragmatic compromise regarding coverage and minimizes the effect on users groups. However, the question is, can coverage be expanded without significant effects on user groups?

For a number of years I have advocated expanding the coverage of moral rights statutes. (But see Karlen, "Moral Rights in California," *19 San Diego Law Review* 699-702 (1982)) E.g. we proposed that glassworks be covered, which was enacted into law in California. The problem is that many works of fine art are simply not paintings, sculptures, drawings, and prints. What about collages, assemblages, mosaics, and the like? Certainly these are considered works of *fine art*, and there is no reason to deny them protection. Are we deciding that works in certain media of expression are deserving of more protection than other works similarly classed as works of fine art?

Moreover, the definitions of *paintings, sculptures, drawings,* and *prints* are certainly open to question as demonstrated by litigation over the years, e.g., in connection with customs cases. (See Derenberg and Baum, "Congress Rehabilitates Modern Art," *34 N.Y.U. Law Review*, 1228 (1959); see also Karlen, "What is Art?: A Sketch for a Legal Definition," *94 Law Quarterly Review* 383 (1978)).

In one case, we were not persuaded that we could do much for an artist who had created a mosaic. In the Cole case, which we handled, the artist had sewn over 50 one-dollar bills onto a canvas, which a disgruntled purchaser decided to remove from the canvas and use as money. Certainly the artist argued that this was a "painting" and should be covered under the statute, although we were never sure what would happen if the case went to trial.

In the Baden case, the work, which we said was a "sculpture," consisted of

steel ramps strategically located in a ravine. In its entirety the work was certainly sculptural, but could it be described as a sculpture? Clearly, the term "sculptural" as already used in the Copyright Act (Sections 101, 102(a)) is broader in concept than the term "sculpture."

Naturally, there are works of fine art which should not necessarily be covered. In one case we were consulted on, the work consisted of sand that had been separately gathered, bottled, and meticulously labeled by the artist. When the artist stored her separate sand containers at an art-storage facility, the bailees, who were moving their business to another location, decided that "sand was sand" and that it was easier to move all the sand if it were dumped into one container. This was more of a conceptual work than a true sculpture.

Althougn this bill, in my opinion, does not go far enough to protect all works of fine art, coverage for paintings, sculptures, drawings, and prints constitutes an important first step toward protecting other works of visual art such as collages, assemblages, and mosaics.

Perhaps one remedy would be a mention in the report on this bill that the intention was to cover works falling within the penumbra of paintings, drawings, sculptures, and prints.

K. FAIR USE

One concession to user groups with which I disagree is allowing the *fair use* defense. (Section 8 of bill) How can it possibly be a fair use to destroy or mutilate a work of art? How can it be a fair use to deprive the artist of credit, especially since giving credit is one of the considerations in determining that there has been a fair use? (See *Marcus v. Rowley*, 695 F.2d 1171 (9th Circuit. 1983)

I don't see how the factors enumerated at Section 107 particularly relate

to these rights of artists. Perhaps it could be argued that nature of the use and effect upon the market for the original work might be relevant, but perhaps there are more direct factors.

I still don't see how users have any need to use an artwork to deprive the artist of moral rights. Dealers, collectors, museums, and art administrators have no need to use works of fine art in a manner which causes destruction or mutilation or deprives the artist of credit.

Perhaps only in the case of Elaine K., where the municipality made what it considered necessary repairs, would there have been a fair use justifying a defense.

If a fair use defense is allowed, it should, therefore, be limited to the making of necessary repairs on a deteriorating or damaged work if the artist, having been given notice, refuses to make the repairs.

L. RECOGNIZED QUALITY

Of great concern is the *recognized stature* requirement applied to destroyed works. (Section 106A(a)(3)(B)) The logic of the bill, in part, perhaps is that destruction does not necessarily affect honor or reputation, whereas mutilation should be actionable even with unrecognized works because it may affect honor or reputation. Clearly, not every child's fingerpainting should be immune from destruction. A law which requires saving everything would only create a world cluttered with kitsch. (See Karlen, "Aesthetic Quality and Art Preservation," *41 Journal of Aesthetics and Art Criticism*, 309 (1983) for extensive discussion on quality standards)

The bill correctly imposes a minimum standard for preservation and correctly sets forth the types of witnesses whose testimony is most appropriate. (Section 106A(a)) One question is, will the work of an unknown artist have to

stand on its own merit, whereas the work of a well-known artist can rest merely on the artist's laurels?

As a practical matter, in all the cases that we have handled, we found that if an artist has a good reputation, almost always the work, no matter how trivial, will pass muster. An obvious reason why "recognized stature" is not a problem is that many potential defendants are logically prevented from using the defense. A collector, museum director, or other person commissioning, purchasing, or displaying a work is hard-pressed to deny "recognized stature" when that person initially chose the work. In a sense, there is an estoppel, and we have rarely seen an art destruction case defended based upon only the *quality* requirement.

However, the unknown artist or the artist who has created very few works will sometimes have problems relating to proof, especially if the work has never been reviewed professionally before its destruction. For example, in the Kupiec case, the artist had not created very many works during her lifetime, and although the work was certainly of high quality, it had not had the professional reviews it deserved before its destruction. This created some obstacles for the artist.

In contrast, in the case of Harold C. who creates works using computers, no one bothered to argue that his work was semi-mechanically created when he made a claim. His reputation was such that "recognized quality" was not even raised.

In the case of Mr. S., who had created a well-known outdoor sculptural work for a municipality under a program sponsoring minority artists, the artist's lack of any prior achievements made his proof of recognized quality almost impossible.

In any case, if the prospective defendant has commissioned the work,

usually he is estopped to deny "quality" or "stature" on the ground that he commissioned the work the way it was.

M. DESTRUCTION

There is a dichotomy in the bill between destruction, on the one hand, and mutilation, distortion, and modification, on the other hand. (Section 106A(a)(3)(A) and (B)) The problem is that this distinction cannot always be made easily. In the case involving selected sand placed in separate containers, mixing all the sands together in one container clearly destroyed the work, which could never be reassembled. In this light, perhaps it could be argued that if the work can be reassembled and restored to its original condition, then it has not been destroyed. The problem is that virtually all works normally considered destroyed can be restored if one is willing to spend enough money.

This reminds me of the Camoin case in France where a dealer waited outside the artist's house for the artist to throw away his torn canvases. The dealer would sew the shredded canvases together and sell them as works by the artist.

In the case involving Mr. A.W., the artist received in the mail from a former friend his original work upon which the disgruntled friend had written profanities and which had been cut up into four pieces. If the artist had been willing to spend enough money, he could have restored the piece to its original condition, at least to all appearances. In the case of Dan C., a dealer felt he could make more money by dividing the piece into four separate canvases and selling them separately to customers in different parts of the country. Theoretically, the artist could re-acquire the four separate pieces, if he had enough time and money, and paste them together into the original piece.

The same problem arose in the Burton case. The plaintiffs' murals had

been installed near a construction site. When the construction project was almost completed, the murals were cut up, used as gates, and dirt was piled upon other sections of the murals. However, when the pieces of the murals were later stored in a warehouse, it became apparent that they could theoretically be restored.

Another example is the Fey case. In that case, the artist and his dealer had a furious argument about a particular piece. When the artist tried to remove the piece from the gallery, the dealer grabbed one end and started a tug of war resulting in the piece being torn in two.

It is difficult to select any standard to solve this dichotomy. After all, whether the piece has been mutilated or destroyed, theoretically it cannot be restored to its original state no matter what repairs are made; microscopically there must be changes. However, I think that appropriate language could solve the problem.

Perhaps the rule could be that if the work can be restored so that it has some artistic integrity, then it has only been mutilated. However, if one is willing to spend enough money, any piece can be restored. A good answer for this problem was suggested by the judge in the Schnorr case, by implication. There must be a standard of reasonableness with regard to expenditures. For example, if the costs of repair or restoration exceed the fair market value of the work, then the work has been "totalled" or destroyed.

IV.

CONCLUSION

In conclusion, the bill is a narrowly drafted piece of legislation designed to remedy both prevalent problems relating to art preservation and crediting and to have a minimal impact on user groups. If anything, the drafters of the

bill have leaned over backwards to accommodate user groups by (1) restricting the scope of subject matter coverage; (2) imposing the requirements of "recognized stature" and "prejudice to honor or reputation"; and (3) allowing the fair use defense.

Again, Mr. Chairman, I commend you for holding this hearing and for your leadership on intellectual property issues, in general. I would be happy to answer any questions you or other members of the Committee may have.

* All cases without citations (except the Camoin case) are cases we have been involved with. Surnames are given only for cases that are a matter of public record.

** Copies of articles written by Peter H. Karlen cited herein are provided herewith.

Peter H. Karlen / Attorney at Law

1205 Prospect Street, Suite 400, La Jolla, California 92037 • (619) 454-9696

Senator Dennis DeConcini
c/o Mr. Ed Baxter
Subcommittee on Patents, Trademarks,
and Copyrights
Room 327
Hart Senate Office Building
Washington, D.C. 20510

July 14, 1989

VIA FEDERAL EXPRESS

Dear Senator DeConcini:

Enclosed are the supplemental answers to questions posed by you to me and to questions posed to me and to Ms. Cawley by Senator Leahy which we received with your letter of June 28, 1989 addressed to Ms. Cawley. Please make these answers a part of the hearing record.

Thank you for giving us the further opportunity to testify. If we can be of further assistance, please let us know.

Sincerely,

PETER H. KARLEN,
A PROFESSIONAL LAW CORPORATION

By _____
Peter H. Karlen

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STATEMENT OF PETER H. KARLEN

ATTORNEY AT LAW

La Jolla, California

Before

SENATE SUBCOMMITTEE ON PATENTS, COPYRIGHTS, AND TRADEMARKS

HEARING ON S. 1198

THE VISUAL ARTISTS' RIGHTS ACT OF 1989

ANSWERS TO SUPPLEMENTAL QUESTIONS
BY SENATOR DENNIS DeCONCINI AND
BY SENATOR PATRICK J. LEAHY

TO SENATOR DENNIS DeCONCINI

1. Professor Damich testified that the Kennedy bill should be amended so that it does not preempt state laws that offer more protection to the artist than the Kennedy bill would. You argue in your testimony that one of the primary reasons to enact moral rights legislation is to provide uniformity of laws. Do you then disagree with Professor Damich's recommendation concerning preemption?

A: One overriding concern is the benefit of uniformity with respect to interstate transactions. User groups should be able to rely upon one legal standard in determining what they can do with works of art. Without uniformity, disputes involving interstate art shipments may result in forum shopping and uncertainties arising from conflict of laws, particularly when it is uncertain where the infringing act occurred or where the work was when the injury occurred. To the extent that federal courts will be enforcing these rights, litigation costs for the court system will be reduced. Also, litigants' costs will be less.

Moreover, the cost of drafting initial agreements will be reduced because attorneys will not have to research the various state laws which may affect the transaction.

To the extent that artists' rights are being merged into the copyright laws which already preempt similar state laws, to further allow the gradual integration of artists' rights into the copyright laws, it would be less confusing if preemption were allowed.

However, there are important considerations weighing against uniformity. Certain States may have cultural properties which merit special protection. Furthermore, certain works by their very nature may deserve greater protection than might be granted under federal law. For example, under California Civil Code Section 989, works of art of "substantial public interest" can be protected by nonprofit organizations. It would be a great shame if a *weak* federal law were allowed to preempt more comprehensive State legislation.

One concern arising from Professor Damich's recommendation is, how do we determine whether similar state law protection is more favorable than that afforded by the federal statute so that it is not preempted? For example, California extends protection only to works of "recognized quality," whereas the proposed federal legislation will prevent or punish destruction only for works of "recognized stature." Is this proposed federal standard less favorable than the comparable State standard? The State standard appears to emphasize the intrinsic qualities or merits of the work, whereas the federal standard may

emphasize the standing or recognition of the work. It is almost like comparing apples to oranges.

2. In your testimony you describe several cases in which you have been involved that demonstrate the need for this legislation. For the most part, those cases involve purchasers of art work either destroying the work because he or she doesn't want it anymore or altering the work because he or she believes it can be improved. If an artist puts the product of his or her creative efforts into the stream of commerce, why shouldn't the normal rules of commerce apply? What is the difference between an artist and an architect, an accountant and an attorney? Why should the artist's reputation and honor be protected by higher standards than anyone else in society? People in other professions are subject to criticism and attacks on their reputations, why shouldn't fine artists who have entered the world of commerce be subject to the same scrutiny?

A: An artist or writer is known by the products of her work. Works of art are not only the stock-in-trade of an artist but also the means by which an artist establishes good will and reputation.

When an artist's work is mutilated without the artist's consent, the artist's reputation may be seriously damaged by public display, and the artist suffers other incidental injuries. For instance, whenever the artist remains the copyright owner, it is often impossible for the artist to exploit copyright rights if the work is destroyed or so badly mutilated that reproduction is no longer possible. Whenever a work is mutilated or destroyed, it is no longer available for retrospective exhibitions. We have even encountered cases where the artist could not register a copyright without requesting special relief because suitable deposit copies could no longer be created after the work had been mutilated or destroyed.

There are many factors which differentiate the artist from the architect, accountant, or attorney. For example, artists may be creating works that are unique originals, so that destruction or mutilation creates harm that cannot be undone. Attorneys preparing contracts, architects drawing plans, or accountants preparing audit results are not usually creating unique originals since the same literary or visual work usually is reproduced in multiples. Moreover, the products of an accountant or an attorney are not usually subject to the kind of public display or public scrutiny upon which the artist depends. Although an architect's plans arguably are subject to public display in the form of buildings, there are overriding concerns regarding real estate which would not make moral rights for architects a viable solution. For instance, changes to a building resulting from zoning requirements, safety concerns, and other

needs of the landowner would override the architect's needs to keep a building design intact. Moreover, the building itself is the result of collaboration and usually contains many elements not expressing the architect's plans. (In general, see Karlen, "Moral Rights in California," 19 San Diego Law Review 675, 680-84 (1982) on reasons for artists' residual rights.)

This bill does not elevate the artist's reputation and honor above that of any other producers of goods, except in connection with the right to prevent physical mutilation, modification, or destruction. The crediting rights in the bill are already somewhat available in many jurisdictions under other legal doctrines, especially unfair competition law, although the purpose of putting crediting rights in the bill is to give artists a safe haven and set specific standards for enforcement.

The purpose of giving artists additional rights vis-a-vis destruction and mutilation, as explained above, is not only to protect honor and reputation but also to protect existing rights, including copyright rights. As mentioned above, if a work is mutilated or altered, it doesn't matter much whether one owns the copyright if reproduction rights cannot be effectuated.

The bill, as we see it, does not protect artists from criticism and attacks on reputation except through miscrediting or through physical conduct affecting works of art.

3. You stated that "the sensible art collector will not refuse to buy a work merely because he cannot destroy it or miscredit it." In spite of this, you mention hearing numerous complaints on resale royalties. Senator Kennedy's Visual Artists' Rights Act proposes a study on the feasibility of implementing a resale royalties provision. Have you found that a resale royalties requirement may in fact be a reason a "sensible art collector will refuse to buy a work"?

A: The California resale royalties statute (Civil Code Section 986) created controversy when it first became known in the arts community. (Karlen, "Artists' Rights Today," 4 California Lawyer No. 3, 22, 25-26 (1984)) There was litigation challenging the statute (*Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980), *cert. denied*, 449 U.S. 983 (1980)) and the Legislature was forced to make amendments, effective in 1983, to protect buyers and dealers.

However, notwithstanding this controversy, the statute has had a negligible effect on art transactions. We have yet to encounter one case in which an artist litigated his right to resale royalties. We have encountered very few cases where artists have even claimed resale royalties. The annotations to the California statute show virtually no appellate cases. Therefore, as a practical

matter, we have not perceived any effect that the statute has had on the art market in California.

Since resale royalty laws exist in countries throughout Europe and in other countries throughout the world, I really doubt whether the adoption of federal resale royalty legislation would create an exodus of collectors from the United States or the transfer of art sales activities to other countries. On the other hand, in marginal cases, collectors will be encouraged to buy works of deceased artists rather than works of artists entitled to collect resale royalties. However, this effect can be minimized by minimizing the royalties themselves and restricting the conditions under which royalties must be paid.

4. California has been a leader in Visual Artists' Rights. How many other states have followed that lead and enacted bills that afford visual artists protection beyond that available under fair competition, defamation, and invasion of privacy laws? In those states that do not have specific statutes addressing moral rights, have artists not been able to protect their interests under existing laws?

A: As we have been informed, eight states in addition to California have enacted artists' rights legislation, including New York, Massachusetts, Maine, Rhode Island, New Jersey, Pennsylvania, Louisiana, and New Mexico.

We cannot tell whether artists in those states not having specific moral rights statutes have been able to protect their interests under existing laws. Certainly the right of integrity cannot be protected successfully without special legislation. Absent such legislation, an artist does not have the right to prevent destruction of a work if it is owned by someone else, except under very unusual circumstances.

Moreover, past attempts to use defamation, invasion of privacy, and unfair competition laws have only been partially successful, and it is difficult for an artist to use doctrines adapted for other areas of commerce without undue litigation and expenses.

5. You suggest that if we decide to permit written waivers of statutory moral rights we should make sure that such a provision accomplishes two objectives, namely protecting artists from being coerced into granting waivers and ensuring that property containing works of fine art remains freely alienable. Would you provide us with suggested language that would accomplish these two objectives?

A: Here is some proposed language mostly following that of the bill.

Where a work of visual art has been incorporated in or made part of a building or public structure in such a way that removing the work from the building or public structure will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and the author or, if the author is deceased, the person described in section 106A(e)(2), consented to the installation of the work in the building or public structure in a written instrument signed by the owner of the building or public structure and the author or such person, then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply, except as may otherwise be agreed in a written instrument signed by such owner and the author or such person.

An agreement described in subparagraph (a) that the rights conferred by paragraphs (2) and (3) of section 106A(a) shall apply, shall not be binding on any subsequent owner of the building or public structure except where such subsequent owner had actual knowledge of the agreement or where the written instrument evidencing the agreeing was properly recorded before the transfer of the building or public structure to the subsequent owner in the applicable State real property registry for such building or public structure.

If the owner of a building or public structure wishes to remove a work of visual art which is a part of such building or public structure which can be removed from the building or public structure without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless the owner (A) has made a diligent, good-faith attempt without success to notify the author or, if the author is deceased, the person described in section 106A(e)(2), of the owner's intended action affecting the work of visual art, or (B) the owner did provide such notice by registered mail and the person so notified failed, within 90 days after receiving such notice, either to remove the work or pay for its removal.

If the work is removed at the expense of the author or the person described in section 106(A)(a)(2), title to that fixation of the work shall be deemed to be in the author or such person as the case may be. For purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good-faith attempt to send notice if the owner sent such notice by registered mail to the last known address of the author or, if the author is deceased, to the person described in section 106(A)(a)(2).

The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building or

public structure, or persons described in section 106(A)(e)(2) with respect to that work, may record their identities and addresses with the Copyright Office. The Register shall also establish procedures under which such authors or persons may update the information so recorded, and procedures under which owners of buildings or public structures may record with the Copyright Office evidence of their efforts to comply with this subsection.

Except as provided in paragraph (2), the rights conferred by subsection (a) may not be waived or otherwise transferred, except by an instrument in writing supported by good and valuable consideration, expressly providing for the waiver and specifically identifying (1) the work of visual art, (2) the rights waived, and (3) the uses of the work to which the waiver applies. Any ambiguity in the instrument with respect to waiver shall be resolved in favor of the reservation of rights by the author or, if the author is deceased, by the person described in section 106(A)(c)(2).

A "public structure" is any bridge, aqueduct, or other public edifice either owned or operated by the United States Government, a State, a political subdivision thereof, or any governmental agency therein, or erected on land owned by the United States Government, a State, a political subdivision thereof, or any governmental agency therein.

TO SENATOR PATRICK J. LEAHY

Q: (To Peter H. Karlen) In your written testimony, you described the destruction of several art works in California. Do you know of instances where the California Art Preservation Act has prevented the destruction of art works?

A: Yes. These are the cases that make the statute worthwhile, not necessarily the litigation cases following mutilation or destruction. We have received numerous preliminary inquiries over the years from artists, collectors, dealers, and building owners asking about their rights in relation to altering or destroying works of art. Except when non-removable works were installed in buildings, for which there was invariably a waiver under the California statute (Civil Code Section 987(g)(3)), I do not recall destruction or mutilation of any work subject to these preliminary inquiries. Also, none of these inquiries, to my recollection, ever was connected with a case which resulted in litigation.

In other words, when collectors, dealers, and property owners know about the legislation, it has a deterrent effect regarding destruction or mutilation. A building owner who is otherwise entitled to destroy a work under the California Civil Code, if knowledgeable, will first consult an attorney in order to confirm the waiver under the statute.

In every case we have had involving an action under the California Art Preservation Act, the defendant did not know about the law.

Q: (To Linda A. Cawley) What comments do you have concerning the provision in Senator Kennedy's bill that allows judges or other triers of fact to determine whether a work of art is of recognized stature? Do you believe that the judges can make an objective determination on this point?

A: In the materials we submitted to the Subcommittee on June 20, 1989, we included two articles by Mr. Karlen, "Moral Rights in California," 19 San Diego Law Review 675 (1982) and "Aesthetic Quality and Art Preservation," 41 Journal of Aesthetics and Art Criticism 309 (1983). The question of deciding "stature" or "quality" was discussed in those articles.

The conclusions reached therein still have merit. The law already makes judgments about aesthetic and artistic quality in many areas. For example, certain works are immune from obscenity prosecutions if they have "serious" literary or artistic value, as per *Miller v. California*, 413 U.S. 15, 26 (1973). There are many laws governing historic preservation which result in protection

of buildings based on not only on historical significance but also on architectural and aesthetic value. Judges also must make judgments about fair market value for purposes of estate, gift, and income taxes when one of the critical factors in valuing a property, such as a work of art, may be aesthetic or artistic value. Moreover, for decades judges made decisions about "art" status and artistic merit under the customs laws. (See Derenberg and Baum, "Congress Rehabilitates Modern Art," 34 N.Y.U. Law Review 1228 (1959).)

In short, decisions can be and are made about stature, quality, and value within the realm of art.

Furthermore, our litigation experience shows that decisions about stature or quality, as already made under the California statute, are not the difficult, pivotal decisions that one might imagine them to be. The typical art destruction case is brought by a well-established artist whose works have already enjoyed critical acclaim. The defendants in such cases, in our experience, have not made a major issue of *quality* or *stature*. Moreover, as we have already noted, because most of the art destruction cases involve defendants who have commissioned, purchased, or already judged the work of art, the defendants are usually estopped from denying that the work is of recognized quality.

For the most part, when the work is by a well-established artist, the question of stature is usually not seriously litigated by a defending party. Only when the work is by an unknown artist could the question become a serious issue.

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Senator DECONCINI. Thank you, Ms. Cawley.
Mr. Van Sant.

STATEMENT OF TOM VAN SANT, ARTIST, SANTA MONICA, CA

Mr. VAN SANT. Thank you, Mr. Chairman. My name is Tom Van Sant. I am an artist and I reside in Santa Monica, CA. Thank you for inviting me to testify on behalf of the Visual Artists Rights Act. I am proud to speak for the national Artist Equity Association in support of this legislation.

I am a founding director of the Los Angeles Mural Conservancy, a member of the city of Los Angeles Department of Cultural Affairs Arts Advisory Committee and an advisor to the International Museum of 20th Century Arts and to Artist Equity Association. I have served on the faculty of the Otis Art Institute, Santa Monica College, and have been a fellow at the Center for Advanced Visual Studies at MIT. As president of Tom Van Sant, Inc., I have executed more than 60 sculpture and mural commissions for public places in the United States and other parts of the world.

Thank you, Senator Kennedy, for introducing this important legislation which will extend rights across the country already enjoyed by artists in nine States, including California. Artists and the artistic heritage of California are protected by the California Fine Arts Preservation Act of 1979.

In California it has become clear that our legislation provides not only penalties for the destruction or mutilation of works of art, but also allows for secondary owners of wall murals or other works attached to architecture to become aware that they are beneficiaries and custodians of parts of our cultural heritage. The bill is limited to paintings and sculpture and specifically excludes motion pictures, art books, posters, and other commercial enterprises. As in our California legislation, this bill requires that an owner who does not wish to retain a work of art attached to his building must notify the artist and allow the artist to remove the work at his own expense. The only relief from this responsibility is in the event that the artist is not of legitimate standing or if the work cannot be removed.

This brings us to my personal experience regarding the loss of a major piece of mine. In 1966 I was commissioned by the Crocker Citizens Bank of California to paint a giant mural for the banking lobby of their new building in downtown Los Angeles. The building was designed by the great architect William Periera to be the tallest building in the city and the headquarters of the banking network. Periera proposed me for the commission and provided a free-standing, lightweight wall extending the full length of the banking lobby, to receive the mural. This made it easily removable. The mural was 13 feet high, 120 feet long, and required 2 years' designing and painting in my studio. Materials used were artist's acrylic on canvas, applied to the wall with clear acrylic adhesive. The commission price in 1966 was $40,000.

The subject of the mural was the history of California migrations. This began with the migration of the native American Indians from Asia, the Spanish explorers, and the building of the Cali-

fornia missions, the rush of Americans to California following the discovery of gold at Sutter's Creek——

Senator DECONCINI. Excuse me for interrupting you. I understand you have a slide or two that you would like to show; if you would like to do that now, perhaps we can put the rest of your statement in the record.

Mr. VAN SANT. At your pleasure.

[Slides being shown.]

Mr. VAN SANT. This is a detail of the center of the mural showing the portions of California migrations, the Chinese that came to work on the railroads, and the Americans coming across the country following the discovery of gold.

Finally, the largest migration to California was following World War II, people from all over the country moving to California for industry, entertainment, aerospace, and agriculture.

This building was opened in 1968 with festivities, and the mural was published by Crocker Bank with pride. Photo enlargements were used to decorate other branch offices and so forth, and it was enjoyed by many citizens and tours.

In 1982, Crocker Bank sold this building to Mitsui Fudosan, a Japanese international real estate and banking conglomerate. In 1984, Mitsui leased the building to AT&T. To accommodate its tenants, the new owners remodeled portions of the building and added another complete floor in the former banking lobby to hold AT&T's computers. As you can see down in the lower part of the picture, there is a quite small figure which shows the size of this mural.

When the building opened, I was notified by those wishing to view the mural that neither the painting nor the lobby was in evidence. My inquiries to AT&T and Mitsui were met with evasiveness and misdirection. AT&T engineers finally divulged the truth, but their sentiments were encapsulated in the expression, "You were paid, weren't you? What's your problem?"

At the urging of Artist Equity Association I reluctantly filed suit against the principals for intentionally destroying this historic mural, on behalf of the public and on behalf of California's artistic heritage. The publicity surrounding this event was instrumental in informing California owners of works of art that they have a responsibility which goes beyond payment for the work. They also have the obligation to protect it against intentional or negligent damage. In addition, a work of art is an expression of the artist's personality; its destruction is detrimental to the artist's reputation. After many months of research, depositions, and negotiations, the suit was settled out of court.

In the past 3 years I have received many requests from art owners for guidance in the maintenance of murals and the care and disposition of art work touched by building renovations or demolitions. It has been gratifying to participate, through the Los Angeles Mural Conservancy, in the salvation of wonderful works which otherwise would have been lost.

With respect and appreciation, I urge you to support this important legislation. It strikes a balance between the interests of the artists and commercial and public institutions and our cultural heritage. The California precedent has been successful, free of any excesses or frivolous suits. This bill creates a needed national uni-

form standard, providing this important protection across the country.

Thank you very much.

[The prepared statement of Mr. Van Sant and responses to additional questions follow:]

Statement of Tom Van Sant MFA
Artist
Santa Monica, California
On behalf of Artist Equity Association

Before the Senate Sub-committee on patents,
copyrights and trademarks hearing on

The Visual Artists Rights Act
June 20 1989

Mr. Chairman,

My name is Tom Van Sant. I am an artist and I reside in Santa Monica, California. Thank you for inviting me to testify on behalf of the Visual Artists Rights Act. I am proud to speak for the national Artist Equity Association in support of this legislation.

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In California it has become clear that our legislation provides not only penalty for the destruction or mutilation of works of art, but also allows for secondary owners of wall murals, or other works attached to architecture, to become aware that they are beneficiaries and custodians of parts of our cultural heritage. This bill is limited to paintings and sculpture and specifically excludes motion pictures, art books, posters, and other commercial enterprises. As in our California legislation this bill requires that an owner, who does not wish to retain a work of art attached to his building, must notify the artist and allow the artist to remove the work at his own expense. The only relief from this responsibility is in the event that the artist is not of legitimate standing or if the work cannot be removed.

This brings us to my personal experience regarding the loss of a major piece of mine. In 1966 I was commissioned by the Crocker Citizens Bank of California to paint a giant mural for the banking lobby of their new building in downtown Los Angeles. The building was designed by the great architect William Periera to be the tallest

building in the city and the headquarters of the banking network. Periera proposed me for the commission and provided a free-standing light-weight wall extending the full length of the banking lobby to receive the mural. This made it easily removable. The mural was 13 feet high, 120 feet in length, and required two years of designing and painting. Materials used were artists acrylic on canvas applied to the wall with clear acrylic adhesive. The commission price was forty-thousand dollars.

The subject of the mural was the history of California migrations. This began with the migration of the Native American indians from Asia, the Spanish explorers and the building of the California missions, the rush of Americans to California following the discovery of gold at Sutter's Creek, the influx of Chinese labourers to build the railroads, and culminated with the greatest migration of all, the movement of Americans to California following the Second World War.

The building was opened in 1968 with festivities and the mural was published by Crocker Bank with pride. Photo enlargements of this painting were used to decorate branch offices. Being open to the public the mural was visited and enjoyed by many citizens and educational tours, and it became a part of the artistic cultural fabric of Los Angeles and California.

In 1982 Crocker Bank sold the building to Mitsui Fudosan, an international Japanese real estate and bank conglomerate. In 1984 Mitsui leased the building to AT&T. To accommodate it's tenants, the new owners remodelled portions of the building and added another complete floor in the former banking lobby to hold AT&T's computers. Floor beams were punched through the mural and another wall built over it's face, thereby mutilating and entombing the painting. When the building reopened, I was notified by those wishing to view the mural that neither the painting nor the lobby was in evidence. My enquiries to AT&T amd Mitsui were met with evasiveness and misdirection. AT&T engineers finally divulged the truth, but their sentiments were capsulated in the expression "You were paid, were'nt you?. What's your problem?".

Upon the urging of Artists Equity Association I reluctantly filed suit against the principals for intentionally destroying this historic mural on behalf of the public and California's artistic heritage. The publicity surrounding this event was instrumental in informing California owners of works of art they they have a responsibility which goes beyond the payment for the work. They also have the obligation to protect it against intentional or negligent damage. In addition, a work of art is an expression of the artist's personality. It's destruction is detremental to the artist's reputation. After many months of research, depositions and negotiations, the suit was settled out of court.

In the past three years I have received many requests from art owners for guidance in the maintenance of murals and the care and disposition of art work touched by building renovation or demolition. It has been gratifying to participate through the Los Angeles Mural Conservancy in the salvation of wonderful work, which would have otherwise been lost.

With respect and appreciation I urge you to support this important legislation. It strikes a fair balance between the interests of the artist, commercial and public institutions, and our cultural heritage. The California precedent has been successful, free of any excesses or frivolous suits. This bill creates a needed national uniform standard, providing this important protection across the country.

Thank you for your attention and consideration.

Dennis DeConcini,
Chairman,
Sub-Committee on Patents, Copyrights & Trademarks,
United States Senate,
Committee on the Judiciary,
Washington,
DC 20510 - 6275

Re: Visual Artists Rights Act (S. 1198) Hearing of June 20 1989
Supplemental questions.

Dear Senator DeConcini,

Thank you for the opportunity to testify before your sub-committee regarding the Visual Artists Rights Act. I am happy to respond to your supplemental questions accompanying your letter of June 28th 1989, as well as any additional questions you may have in the future.

Moral Rights Waivers - response to DeConcini

I and Artist Equity Association, would oppose a provision in this legislation which would allow an artist to waive moral rights.

In principle, it could be said that the best legislation regarding contracts would be that legislation which allows the widest options to the participating parties. I believe this to be a valid exception for several reasons.

1. There is a dramatic difference between the social and economic power of the two parties entering into such an agreement. I believe dealers and collectors would cause waivers to become common practice due to their position in the relationship.

2. I believe the purpose of this legislation is to ensure artists rights and to protect our cultural and artistic heritage. Though the artist may waive his personal rights, by this act he is also waiving what implied rights the community has to preserve works of art from destruction

Artist/Client relationships - response to DeConcini

I have no reason to believe that the relationship between artists and their clients would be harmed by moral rights legislation. There has been only one case taken to court under the California

/cont..

Tom Van Sant, Inc. • 146 Entrada Drive • Santa Monica, California 90402 • Tel. 213 459-4342

Fine Arts Preservation Act since its adoption in 1979. All other cases have been settled out of court. There have been no frivolous suits, no confounding of lawyers and judges, no burdening of the courts, and no reduction in artist's sales or commissions. To my mind, there have been no requests for moral rights waivers.

Fine Arts Losses - response to Leahy

The loss in 1984 of the Crocker Citizens National Bank mural is not an isolated incident. Every active, mature artist I know has suffered the loss or mutilation of one of his major works. We hear of the loss or alteration of the Calder sculpture in Pittsburg, the Noguchi piece in New York, the Smith mural in Maryland and the chopped up Picasso. What is not well known are the losses occuring each day in local communities. Los Angeles has lost major works by Richard Haines, Susan Hertel, Millard Sheets, Kent Twitchell, Jane Golden, and many others prior to 1979. There have been fewer losses since the enactment of the California Fine Arts Preservation Act. This legislation has made possible the forming of the Los Angeles Mural Conservancy which now catalogues, restores and provides guidance to mural owners regarding preservation.

Success story: In 1987 the Beverly Wilshire Hotel called me regarding the California Fine Arts Preservation Act and a Millard Sheets mural in an area destined for renovation. The Mural Conservancy advised them in the removal of the mural. The Beverly Wilshire presented it as a gift to the people of Beverly Hills, and the mural now decorates a wall of the new Beverly Hills City Hall. The hotel benefited from the publicity and the community benefited from the mural relocation. This story would not have taken place without the California arts legislation.

Thank you for your consideration of the Visual Artists Rights Act.

Sincerely,

Tom Van Sant

Tom Van Sant MFA
President, Tom Van Sant Inc.

Senator DECONCINI. Thank you, Mr. Van Sant.
Mr. Wilson.

STATEMENT OF MARC F. WILSON, DIRECTOR, NELSON-ATKINS MUSEUM OF ART, KANSAS CITY, MO

Mr. WILSON. Mr. Chairman, members of the subcommittee, thank you for this opportunity to participate in this discussion on Senator Kennedy's Visual Artists Rights Act. I am Marc Wilson; I am the director of the Nelson-Atkins Museum of Art in Kansas City. I am also the second vice president of the Association of Art Museum Directors. I, too, wear an academic hat; I was a professor at the University of Kansas. I am also your chairman of the Indemnification Program on the Federal Council on the Arts and Humanities.

I will forgo reading my statement, as it has been submitted, and I will ask that it be made part of the record. If I may, I will depart from that and concentrate on a few issues.

None here would deny the importance of the arts or of visual artists; they are a record of the spirit of our Nation. That certainly is not at issue. They are, as individuals and as an industry, part of a much larger complex. They are important to our society. There are many elements. There are those of us who are charged with presenting works of art to the greater public through museums, galleries, public galleries. There are those who sell works of art, trade in them, and profit from them. There are those who write about them, those who study them, those who publish and disseminate them to the interested publics.

Whatever version is adopted in this bill will take into account that artists and art are an integral part of our Nation and that they are, indeed, part of the glory of our Nation.

Turning now to the legislation under consideration, let me commend you for undertaking this and Senator Kennedy for bringing this bill to us. We must consider it; the status quo is not enough.

It is very complex, and it will require considerable discussion. You have already had considerable discussion. I am here today to support the underlying concept of this measure, namely, to guarantee the integrity and the attribution rights of artists. Specifically, as a consensus of art museum directors we are in agreement with the intent of the legislation, particularly with respect to mutilation and the rights of the artist to associate or disassociate himself with his work.

When first introduced there were problems with the legislation, and a good deal of thoughtful revision has taken place. I am pleased to acknowledge that. We have had clarification of opportunity and protection, and I really think that must not be sacrificed. Those of us who are charged with showing these works to the public—and indeed, very often acquiring them on behalf of the public—still have some concerns. The word "distortion" had been eliminated from an earlier version, and it is returned. I hope that word will be considered carefully. To those of us who install these works of art, that word could unnecessarily lead to litigation. The example of California suggests that perhaps it is not a great problem, but why risk it? Artists naturally have, as anyone involved

with paternity, a great stake in that work of art and what they consider to be its proper presentation. A serious mislighting, perhaps changing the lights—if it is not properly lighted, "you have distorted my work."

The other issue is questions of royalties, whether that is going to help the artists or not. I suspect that it might do more harm. I am very pleased to see that this has been assigned for study to the National Endowment for the Arts.

One must also make a distinction between possession and ownership, as we possess many works of art which have come to us through involuntary possession.

Finally, I think the question of transferability must be studied. Will it be harmful? Will it not? My own experience suggests that it may be harmful, particularly for the majority of artists. It may end up that both the sales royalties and the question of alienability will serve the interests of a small percentage of very successful artists and do nothing, or perhaps harm, the great majority of artists.

I thank you for taking up this important work.

[The prepared statement of Mr. Wilson and responses to questions submitted by Senator DeConcini follow:]

Statement
Presented by

MARC F. WILSON
DIRECTOR
NELSON-ATKINS MUSEUM OF ART

Before
THE SENATE JUDICIARY
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
UNITED STATES SENATE

June 20, 1989

Mr. Chairman and members of the subcommittee, thank you for this opportunity to participate in the discussion of the Visual Artists Rights Act, introduced by Senator Edward Kennedy. I am Marc Wilson, Director of the Nelson-Atkins Museum of Art in Kansas City, Missouri, and Second Vice President of the Association of Art Museum Directors.

Before I speak on legislation to provide certain rights to visual artists, I wish to comment on the vital role played by the individual creative artist in our society. America's growing artist community leads the world with vigorous innovations and sets a high standard of excellence. The men and women who are inspired to create works of art capture the essential human qualities of our time and enhance our understanding of our world and ourselves.

The individual artist is not only a critical element of the arts community, but also a vital part of society as a whole. My institution in Kansas City, along with arts institutions across the country, have the enormous responsibility of preserving and articulating our cultural heritage, and fostering the creativity that is to become the patrimony of future generations. The success of this important mission is directly dependent on the artist. Their unique contributions must be taken seriously; and their rights and the works they produce are unquestionably worth protecting.

With the well-being of our cultural community in mind, public policy must take on a new sense of vision. This new vision must reflect an understanding that the arts are an integral element of our civilization - that they are vital to our national character and are among the greatest of our national resources.

Turning to the legislation under consideration, let me first commend this subcommittee for its interest and attention to the important matter of visual artists' rights. The arts community is certainly in favor of safeguards against irretrievable damage to cultural properties. The Visual Artists Rights Act brings meaningful and extremely complex issues into the limelight, and I am here today to support the underlying concept of this measure,

namely guaranteeing the integrity and attribution rights of artists.

We are in agreement with the intent of the legislation, however some specific concerns remain. As you may recall, there were problems with the bill introduced during the last Congress. The new legislation offers considerable improvement, and we are pleased many of the questions raised last year were addressed.

The moral rights provisions of the bill - pertaining to the rights of paternity and protection - have been partially clarified with a special exemption for legitimate conservation practices. Thus, last year's concern that conservation measures performed by museums to protect works of art might be affected by language that read "distortion, mutilation, or other alteration thereof" has been alleviated.

Still at issue are possible implications of the use of the word "distortion." This term might be so extended as to apply to the manner of installation or framing of an art work in an exhibition setting, or even the color of the wall in the gallery containing the work. A revised draft of last year's bill deleted the word "distortion" and was modified to read, "significant or substantial mutilation, or other alteration." This was an important adjustment and we would hope that the same language will be included in the current legislation.

As to the royalty section of the bill, substantial progress was made last year. We are pleased that a subject of this complexity would be referred to the National Endowment for the Arts and the Register of Copyrights so that it can be thoroughly examined before any action is taken.

Briefly, one point on the royalty provision requires comment. The economic impact of this measure on most American art museums would be significant. These institutions are nonprofits and they operate with limited acquisition funds. The imposition of a seven percent royalty, as called for by last year's legislation, could lead to a reduction in acquisitions of contemporary art works by American artists.

Again, resale royalties is an extremely difficult and complicated issue. Deferring it until its consequences can be accurately measured is indeed a major improvement.

In closing, I would like to thank the subcommittee for receiving me today and for recognizing the important role of America's artists. I applaud Senator Kennedy's effort to enhance public recognition of our nation's creative individuals and to protect their contributions to society.

The intent of the Visual Artists Rights Act is most admirable. I hope you will consider the clarifications I have outlined, and continue working with the arts community to move forward on providing much needed protection for our nation's artists.

The Nelson-Atkins Museum of Art
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12th July, 1989

Senator Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator DeConcini:

Thank you for your recent letter of June 28 in which you invite me to answer the question, "Why then do we need moral rights legislation?" to provide further protection for artists.

The immediate reply is that there may be some solution to the problem other than the adoption of moral rights legislation. The goal, it seems to me, remains the same. That goal is to provide greater protection and strengthen the hand of artists at the time of the creation of the work of art with respect to mischievous alteration of the image that would undermine or erode the artistic integrity of that work of art. As a concomitant to this goal, the artist's reputation should be secured from damage by such mischievous or unwanted mutilation or alteration of the work of art.

The issue is very complicated. I was impressed at the Subcommittee hearings on June 20 with the arguments of the three lawyers with respect to the introduction of concepts of droit morale into our legal system, which is largely based on English concepts, particularly with respect to property and the rights of property owners. In a sense I subscribe to the views of the lawyers without, however, giving up the need, as Senator Kennedy has recognized, to strengthen the position of artists with respect to reasonable control over the maintenance of the artistic integrity of a work as it passes from his hands and thence from owner to owner.

Legislation which helps maintain that integrity is, I think, needed. The legislation, however, should not in my view go much further. Let us continue by drawing a distinction between a work of art and a piece of music, for example. A work of art differs in that it is a tangible, physical object. It exists whether it is in storage, on someone's wall, or whether there is

a viewer appreciating it or not. It can be replicated through photographic and printing processes with necessary changes of scale and discrepancies in texture, color, and the like, that are inherent in any such process. A piece of music on the other hand does not exist until it is performed. That performance, moreover, is ephemeral. The music score itself is really a set of instructions to another person on how to achieve a close approximation of what the composer had in mind. There must necessarily be royalty arrangements to handle compensation for a composer since his music exists only when played. The set of instructions themselves have no more value than the cost of publishing them. The desirability of playing that music may increase in time or may disappear, just as the desirability of owning a work of art may increase or disappear. It is important then to recognize the distinction between the physical existence of the visual work of art. It is property and is a commodity.

The visual work of art also tends to be unique, or at least limited to a serial edition. The situation with music and with printed material is different. We can produce as many copies of the score of Beethoven's Ninth Symphony as we wish or as many copies of Edgar Allen Poe's works as the market will absorb. In drafting new legislation this distinction is important.

The artist of a visual work of art is compensated for his production at the time it is created or when it first passes from his control to that of a subsequent owner. It may happen directly or it might be via a dealer. Heretofore, and throughout much of our history, a work of art has been treated as property and all rights transfer to the new owner. The transfer of rights was modified slightly with the change in the copyright laws to protect contemporary artists. It must be recognized in drafting any legislation, moral rights legislation or contractual, that most works of art decline in value. The imposition of legislation that would encumber subsequent owners from disposing of or treating the work of art as they wish, may work to the detriment of young and emerging artists. That is why I believe that if moral rights legislation is passed, the artist must have the right to waive those rights.

Let me give you concrete examples from the world of art museums. A frequent ploy adopted by artists and their dealers to gain recognition for the artist is to donate works of art to museums. The dealer and artist may do this directly, or they may enlist the aid of a patron who will be persuaded to buy the work of art and then, in turn, donate it to an art museum. This has marketing consequences because it enhances the reputation of the artist and therefore his saleability to be able to claim that certain museums have his works represented in their collections. It adds to the prestige of the artist. In accepting the work of art, the museum weighs the usefulness of the work of art, the potential importance of the work of art and

the artist, against the burden of ownership, and the moral obligation museums feel to care for works of art in their charge. Too often museums accept works of art to be nice to artists. Very often those works of art are accepted, even though the museum knows that they will be seldom if ever displayed. In some cases, of course, the work of art will be of great quality and the artist will go on to achieve a great success. Please remember that very few artists are actually successful and achieve reputation, fame, and the wealth that the news media sensationalize these days. Successful ones are the rare ones. Most artists do not produce great works of art.

What will a museum do if the museum does not have unencumbered rights over the work of art? Museums are likely to be much more reluctant to accept gifts of works by emerging artists. Such an outcome would not obviously be beneficial to emerging artists. Having unencumbered title to sell the work of art, to dispose of it, or even to destroy it, is important to museums.

Following along this thinking, please remember that our societies, all of them, have produced far more works of art that have not stood the test of time than those that have stood the test of time. Those that have stood the test of time are eagerly sought after, fill our museums, bring our societies great joy and often fetch great sums. But our societies in time must be free to allow the works of art that do not stand that test of time to disappear from history, to fall gradually into decay and thence to pass out of existence. It would not be good, in general, to have legislation which forces collectors or museums to keep in good condition works of art that are marginal and have not stood the test of time. We simply must allow for the natural disappearance of things.

I also think that any legislation which tries to help artists by allowing them to participate beneficially in the increase of the value of their works of art is bound to help only the handful of very successful artists and is equally bound to hurt the sale of artists who are emerging or whose works of art will not live beyond their time and their epoch.

Can regulations governing contracts between artists and buyers help in the above situation? I think the answer is yes, provided the artist's hand is strengthened so that the artist is not totally at the mercy of the need to sell his works.

I might also point out a technical matter in our industry. This again has to do with the desire of artists to place their works in museums and to gain recognition in juried exhibitions. Art museums, believe it or not, have a terrible problem with artists abandoning their works of art. Works are submitted for juried exhibitions, and if the artist is not successful, he often simply abandons the work of art and leaves the art museum stuck

with the problem of caring for it, storing it, and so forth. If legislation is drafted and passed that would oblige an owner to care for a work of art and not negligently allow it to be damaged, then those owners certainly must be protected from artists who abandon their creations.

In sum, I see many pitfalls to the enactment of moral rights legislation or the legislation that goes beyond strengthening the artist's position in making contractual obligations at the time of the sale of his work of art. I know that our society attaches great importance to art. It has almost become a hallowed thing. Let us also remember that it is a commodity as well as the record of an individual's creative efforts.

If there are any other thoughts or questions that you might have, you might ask a member of your staff to phone me. Senator Kenney recognized a need. We must be careful that we do not do more harm than good in meeting that need.

The views expressed above are my own and do not represent the views of any other party or organization.

With every good wish,

Cordially yours,

Marc F. Wilson
Director

MFW:rm

cc: Mr. Darrell Panethiere
c/o Senator Orrin Hatch

Senator DECONCINI. Thank you, Mr. Wilson.

Mr. Van Sant, let me ask you this question. Your slide show and your personal involvement are of great interest to me. Could you have initially contracted for the preservation of this mural when you were employed to paint it, to do it, to create it?

Mr. VAN SANT. I don't know how such a contract would have been made at that time, to preserve a mural through a second ownership. I don't know how it would have been protected except by virtue of the California Fine Arts Preservation Act.

Senator DECONCINI. You don't know of anything that would have prevented you from asking for such a contract, in whatever employment arrangement you had with them to create this work of art. Could you have sought to have the right to retrieve the work of art if the building were sold or transferred or if the owner wanted to change it? You could have entered into such a contract, but you didn't?

Mr. VAN SANT. As a young artist being given an opportunity to paint that mural, I can't conceive of being able to include in my contract its preservation through second ownership and so forth.

Senator DECONCINI. Is that because, as a young, new artist, you are less able to negotiate with large business interests because you are interested in getting your work displayed and you are interested in being able to do your work—but that business negotiations are not on your mind.

What about today, now that you are an accomplished artist? If you are commissioned to do some work of art, would you put that in a contract now?

Mr. VAN SANT. No, I have never known of that being put in a contract.

Senator DECONCINI. Even if you did some work outside of California, where you are not protected by the California law, would you think that that would be a proper thing to do?

Mr. VAN SANT. I work outside of California and have never included that in any contract.

Senator DECONCINI. On your belief that there should be some protective rights here, by your creation of your artistic work, right?

Mr. VAN SANT. Yes, sir.

Senator DECONCINI. Mr. Wilson, if you have work in your museum that you choose no longer to display—you've had it there for a period of time—I presume that you give it back to the artist, or you store it. Maybe you give it away, depending on the arrangement you have. If you store it in a warehouse or someplace that is not for public display, and yet when you took it from the artist he was under the impression that you were going to display it publicly, does this prejudice the reputation of the artist? Does he have a right to demand that——

Mr. WILSON. Well, to the extent that he is not exposed and before the public eye, I suppose you could conclude that. I think there are practical matters. We must remember that most works of art in museums are really, in a sense, held publicly, even though they might be held for a private trust or foundation. They are held for the benefit of the public. We do not enter into any agreement with an artist to display a work of art when it is given to us, nor when we purchase it.

Senator DECONCINI. So you have no arrangements that you will or will not display it?

Mr. WILSON. No. That is correct. Again, we do feel a moral obligation to care for any work of art in our possession, whether we own it or not.

Senator DECONCINI. Well, if I was an artist and you and I agreed that you wanted to display my work of art and all of a sudden you put it up for a week and then you took it down, would I have a cause of action for you under this bill?

Mr. WILSON. I don't think so. This is about distortion and mutilation. This is not about exposure. We would not buy or accept on loan any work of art from a third party with a provision that we would have to display it in perpetuity.

Senator DECONCINI. Ms. Cawley, you indicate that the California law that is similar to the bill we have here has only generated about a hundred cases, and that only one of these cases—I think the Schnorr case—actually went to trial.

What was the disposition of most of the other cases, do you know?

Ms. CAWLEY. The majority of the cases that we have handled have settled. They generally settle at between 7 to 10 times the value of the artwork or the fair market value of the work at the time.

Senator DECONCINI. That's based on an appraisal value of the artwork?

Ms. CAWLEY. No, the actual cost. And that's not a fair assessment of the value because often, as we've discussed here, artists will work on artwork for much less than they should because they want to enhance their reputations. But 7 to 10 times the value is what we usually see in settlement.

Senator DECONCINI. A hundred cases is not very many cases. When was the California law enacted?

Ms. CAWLEY. Well, we get about 100 inquiries a year——

Senator DECONCINI. That's your law firm?

Ms. CAWLEY. Yes. Two to three phone calls a week for artists asking, "Do I or do I not have a case?"

Senator DECONCINI. And you file about a hundred cases a year?

Ms. CAWLEY. No, I'd say much less than that. Most cases we don't even get to file. On demand letters, we are able to settle the case based on the statute, because what we find is that most potential defendants didn't know about the statute.

Senator DECONCINI. Senator Kennedy.

Senator KENNEDY. Well, that's helpful, because I think one of the important issues to establish is whether this is really a problem. Some of us hear of the more notorious situations, but whether this is a common occurrence—something that is ongoing and continuing in the country—just personally, it is very disturbing to think that people are involved in these kinds of mutilations and changes. The country was absolutely startled at the time when the Picasso picture was chopped into 100 little pieces. It was something that people just weren't able to focus on.

What I hear from you is that these are very real problems. They are happening and not only in California where your area of practice is. That is your impression, and I would like to ask Tom Van

Sant also if this is, to his knowledge, happening in other places around the country. Is that correct?

Mr. VAN SANT. Yes, sir.

Senator KENNEDY. Now there are nine different States that have laws. How do you react to the question, "why not just let the States do it?" If we have nine States that are doing it, why do we need a Federal statute?

Ms. CAWLEY. The one that we just discussed is of knowledge to the users and the artists themselves. I think a Federal law would provide much greater knowledge to the mass public, to the general public, and to users. Galleries would inform artists; they would in turn inform the purchasers that this law is a Federal law. Newspapers would report it and cover it. State cases would come out, rendering different decisions. We would have a broader base to work with, but more importantly, we would have uniformity of law.

What we have seen in quite a few of our cases or inquiries is that when people ship artwork from one State into another State, they don't know where the damage occurred. If it was negligently packaged, then where did the damage occur? If it was in California, they would have a law to cover it. They would have redress; in another State, they would not. And with the States that do have similar statutes to California's, there are conflicts in those laws.

Senator KENNEDY. Well, your point, which I think is a very important one, is that you get a greater understanding, greater sensitivity, and greater awareness by the population generally with a Federal statute. The result would be greater preservation of art. You also testified that when you were raising these matters with individuals, they didn't have familiarity with them. In a great majority of cases once individuals know about them, they are quite prepared to respect the law—and not to take steps that might threaten the integrity of the art. Is that the case?

Ms. CAWLEY. Generally, our cases settle immediately upon the lawyers for the users learning of this act.

Senator KENNEDY. And you feel that the features that we have in our law, given your own experience, will provide that degree of protection?

Ms. CAWLEY. Very much so.

Senator KENNEDY. Should the national law preempt the State law?

Ms. CAWLEY. In general, yes, it should if it is prospective in nature so that any damage to work will be covered, and so long as it is not so broad that it preempts more specific laws in each individual State.

Senator KENNEDY. Well, I think it is important to get your answer. My understanding is that the only preemption is that which applies in the very narrow and limited area affected by this legislation. We are not preempting the related features of other State statutes that may provide some protection in other areas. Am I correct?

Ms. CAWLEY. I think that would be great. Under section 301 of the Copyright Act, that would be exactly what would be necessary.

Senator KENNEDY. And for the reasons that you outlined earlier, it is best to establish a national standard.

Senator DECONCINI. Would the Senator permit me to leave and leave you with the balance of the hearing?

Senator KENNEDY. I wanted you to hear this. [Laughter.]

Senator DECONCINI. I did, and I will, and quite frankly because I wanted to listen to the Senator I refrained from asking Ms. Crawley in particular a number of other questions which I would like to submit to her and the members of the panel.

Senator KENNEDY [assuming the chair]. Again, I want to express our appreciation to Senator DeConcini for both his attentiveness to this issue and his interest in it, and for his willingness to work with us on this program.

I just have a few more questions. The first is on the question of frivolous claims or unreasonable numbers of suits. What is your reaction or your response to that?

Ms. CAWLEY. I would think that this bill would have just the opposite effect if it was made into law. I would think that it would deter frivolous claims. If you have legislation that is specific enough, which I think this bill is and as I think our California law is, it would deter frivolous actions. We often get calls from people who say, "Do I have a case? Is this a good case?" And we say, "Can you prove gross negligence? Can you prove reputation? Can you prove all of the elements?" When we have it right before us, we present it to the artist. They think about it and they weigh the merits. They have a choice, and then they do not bring an action.

Senator KENNEDY. So your own experience in California is that there haven't been frivolous claims or unreasonable numbers of claims?

Ms. CAWLEY. Definitely not. I think also that users are deterred from destroying or altering works of art when they learn of the law, as well.

Senator KENNEDY. Let me move to the issue of whether these rights ought to be waivable. Could you give me your opinion?

Ms. CAWLEY. I think they should not be waivable. They are waivable in California under specific restrictions: that they are in writing, which puts the cost of the transaction on the user, and if they are attached to a building and cannot be removed without causing harm to the building.

But with this legislation and with the Federal legislation here, I don't think it should be waivable because in effect it will destroy what we are making the law for anyway, which is that young artists are going to be forced into signing a waiver. If my clients were users or gallery owners, I would tell every one of them, "Get a waiver. Don't even take the piece of art; it might get damaged. Get a waiver." All lawyers will be telling the users that. No artist will be able to get their work put on display without a waiver, and that defeats the whole purpose.

Senator KENNEDY. With respect to the standard of harm to honor and reputation—as you are aware, we have changed the standard in this version of the bill. I'm just wondering if that is too difficult or excessively burdensome for an artist to prove.

Ms. CAWLEY. I don't think so. I think that just by mutilation or destruction of a work you are able to prove damage to reputation, the fact that it is destroyed. It would be similar to defamation. In California, it is specifically provided for that when an artwork is

destroyed, there is damage to the reputation. I think it can be established with expert witnesses and testimony, and it can be overcome.

Senator KENNEDY. The harm to reputation exists in the California standard?

Ms. CAWLEY. Yes.

Senator KENNEDY. And the standard weighs more heavily in assigning damages than in establishing that an injury has occurred. OK.

Well, Mr. Wilson and Mr. Van Sant, if there are any comments on any of those questions that you would like to address or that you might take exception to, we will give you the opportunity. I think that during the course of the hearing these are the principal areas where there has been focus and attention. If there is any additional concerns or comments on these answers, we would hear you out.

Mr. VAN SANT. I have one thought I might offer. Most of the testimony deals with the negative consequence of destruction or mutilation. There is also a positive consequence to the legislation. In the State of California, first of all, it was several years before even the first action was taken. There were no frivolous suits. In 1987, we formed the Los Angeles Mural Conservancy, and this was as a direct consequence of the legislation, so now we have cataloged all the murals in the city of Los Angeles. When a building is purchased by a new owner, the Mural Conservancy notifies the new owner that they are the lucky owner of a work of art that is part of the heritage, and they offer their services for maintenance and restoration. Everybody wins and everybody appreciates it.

When a mural on the Beverly Wiltshire Hotel had to be removed for renovation, we were called. The Beverly Wiltshire took the mural down, gave it to the city of Beverly Hills for their new city hall. It was good for everyone. So it seems to be a win/win situation; there don't seem to be only the adverse and negative consequences, but there is the presence of positive consequences.

Senator KENNEDY. Let me ask a rather obvious question on which it would be useful for us to get a clear answer that is on the relative importance of these rights of attribution and integrity. Are they really needed? How much is the bill really needed?

Mr. VAN SANT. I don't know an artist that hasn't suffered from the loss of work at one stage or another in their careers. They have long careers, and some of our major works in California have been lost throughout the years. So we have welcomed this legislation tremendously.

Senator KENNEDY. On another area, did you have an opportunity to talk with anyone who worked on the renovation which destroyed your mural?

Mr. VAN SANT. Yes. My inquiries over several months were unfruitful. Interestingly enough, when the first breakthrough came—I sort of worked my way down through the hierarchy, down through the owners, the building management company that supervised the renovation, then the contractor, and finally I spoke to the job supervisor. That was the first time I learned about what happened to the mural. He said, "Boy, I sure remember being ordered to put a wall beam through that painting. I told my boss that

I didn't feel that that was really the right thing to do, that there was really something wrong with doing that." That was the first breakthrough in finding out what happened.

Senator KENNEDY. Well, it's a sad ending to the story, but again I think it does illustrate the importance of trying to enact legislation in this area.

I want to thank all of you very much. We won't burden you with many additional questions, but there may be some specific areas of interest. Thank you all for your support. We are going to do everything to get the legislation passed.

Ms. CAWLEY. Thank you, Senator.

Mr. VAN SANT. Thank you, Senator.

[Whereupon, at 12:21 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

ADDITIONAL SUBMISSION FOR THE RECORD

The Register of Copyrights
of the
United States of America

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Washington, D.C. 20540

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October 31, 1989

The Honorable
Dennis DeConcini
Chairman
Subcommittee on Patents, Copyrights,
and Trademarks
United States Senate
Washington, D.C. 20510

Dear Senator DeConcini:

I submit the written views of the Copyright Office on S. 1198, the Visual Artists Rights bill. Since I did not testify at your hearing on this bill, the Subcommittee staff suggested that comments could be submitted for inclusion in the hearing record.

If I can be of any assistance to the Subcommittee, please let me know.

Sincerely,

Ralph Oman
Register of Copyrights

Enclosure:
Statement on S. 1198

STATEMENT OF RALPH OMAN
REGISTER OF COPYRIGHTS
on S. 1198
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
SENATE COMMITTEE ON THE JUDICIARY
101ST CONGRESS, FIRST SESSION

"VISUAL ARTISTS RIGHTS"

I am Ralph Oman, Register of Copyrights in the Library of Congress. At the suggestion of the Subcommittee staff, I am submitting my written views on S. 1198, the Visual Artists Rights Act of 1989, since I did not appear at the June 1989 hearing.

S. 1198 would grant visual artists new federal rights under the Copyright Act: 1) a right to claim or disclaim authorship; 2) a right to prevent distortion, mutilation, and other modification of their work, and 3) under certain circumstances, a right to prevent destruction of a work that is incorporated in a building. Known in civil law countries as moral rights, or "droit moral," the first two of these rights have been granted in various forms to authors in many foreign countries, and to a limited extent, under various legal theories in the United States. Visual artists' rights have also been enacted in ten states.

I. BACKGROUND

A. Moral Rights Overview

In the last Congress, I testified before this Subcommittee regarding moral rights proposals when United States adherence to the Berne Convention for the Protection of Literary and Artistic Works was under consideration. I urged that Congress should take a "minimalist" approach

regarding the legislative changes needed to conform our copyright law to the Berne Convention. Congress adopted the minimalist approach, and on March 1, 1989, the United States adhered to the 102-year old Berne Convention without enacting additional moral rights protection.

Last year, the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice asked the Copyright Office to conduct a study relating to colorization, time compression, "panning and scanning" of films, and other technologies used in the alteration of motion pictures. On March 15, 1989, I submitted the colorization study. I believe the time is now ripe for a comprehensive examination of moral rights in all fields of authorship.

Under the laws of most European countries, moral rights are included in the bundle of rights that comprise a copyright. These rights are considered to be personal rights generally that are different from the economic and proprietary aspects of copyright. The term "moral rights" does not have a precise definition; in general, it refers to those "non-economic" rights ensuring respect for the creator's personal vision, as embodied in a work of authorship. In general, there are four basic moral rights: 1) the right of publication; 2) the right to withdraw a work from public distribution; 3) the right to claim and be credited for authorship (known as the right of attribution); and 4) the right of respect for the work, known as the right of integrity.[1] The principal moral rights are those of attribution and integrity. The right of attribution protects an author's ability

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1 These are the most commonly recognized rights at the national level. It is important to note that the Berne Convention refers only to three and four above.

to receive credit for his or her creations, or to disclaim authorship of works that he or she did not, in fact, create. The right of integrity permits an author to prevent changes in his or her work that are "injurious to his or her honor or reputation;" for example, changes that materially alter the author's vision, or inaccurately represent the author's views as expressed in a work.

The theory of moral rights is that they resul' in a climate of artistic worth and honor that encourages the author in the arduous act of creation.

S. 1198 would assemble in the federal copyright law rights that already exist in some measure, but are dispersed among the common law, disparate state laws, and federal unfair competition laws. The bill would also offer authors the opportunity to safeguard from destruction their works of art that have been incorporated in a building in the event the owner wishes to remove the work of art or demolish the building.

Of the two core rights of attribution and integrity, the right of integrity is the more controversial. The integrity right generally means that an author, even if he or she has conveyed or licensed all economic rights to the work, retains the power to prevent, or at least object to, the distortion of the work by the transferee or licensee. An overbroad right against any material alteration could unnecessarily interfere with the ordinary marketing and distribution of works. Visual artists may have a special need for a right of integrity--that of preservation. If a unique work is distorted, mutilated, or altered, it may, for all practical purposes, have been destroyed. The general view of commentators is that out-right destruction of a work is not a moral rights violation. Moral

rights are personal to the author and are intended to protect the personality and integrity of the author, not necessarily the work itself. Although for most works, destruction rights and moral rights are distinct -- one protecting the work (preservation) and the other protecting the author, for works such as single copy works of art, the two rights are not inconsistent. Moral rights protect the author's interest in being known to the public through the work as originally conceived. These rights may also serve the public interest -- especially with regard to works of art.

Finally, consideration of visual artists' rights is well under way in several states. Congress should weigh the benefits of creating a federal visual arts moral rights system in view of the growing number of state visual artists' rights laws.

B. STATE LAWS

State visual artists' rights laws have more than doubled during the last five years. States enacting moral rights for visual artists may be categorized as following one of three models: the preservation model, the moral rights model, or the public works model.

States following the preservation model seek to protect artistic works from destruction in addition to providing for attribution and integrity rights.

In other states, only the moral rights of paternity and integrity are provided. Destruction is not, strictly speaking, a violation of a moral right in those states, since where the work is destroyed, the moral right can be considered extinguished. Nothing is left to which the right can attach.

The public works category is least related to copyright and more related to state police power. It seeks to protect works from vandalism. These laws safeguard state treasures, antiques, and other works of historical or other value as a normal exercise of keeping the peace. As a subset of moral rights laws, at least one state has restricted (perhaps experimentally) moral rights and preservation rights to works that are displayed in public buildings.

1. Preservation Statutes.

California [2]

In 1979, California became the first state to enact moral rights legislation. The California Art Preservation Act seeks to preserve works of fine art and protect the personality of the artist. The Act prohibits the intentional "defacement, mutilation, alteration, or destruction of a work of fine art." Where the alleged mutilation was associated with an effort to conserve a work of fine art, evidence of gross negligence is required. Additionally, the artist has a right of attribution, and "for just and valid reason," the right to "disclaim authorship of his or her work of fine art." The rights of attribution and integrity may be waived by written contract. Owners of buildings who wish to remove a work of fine art capable of removal without mutilation are subject to liability under the Act, unless they attempt to notify the artist of their intention and provide the artist with an opportunity to remove the work. Where the work is not capable of removal without mutilation or destruction, unless the artist has reserved moral rights in writing, they are deemed waived.

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2 Cal. Civ. Code §987 (West's Anno. Cal. Codes Supp. 1989).

Connecticut [3]

The 1988 Connecticut law, also a preservation and moral rights statute, contains a detailed definition of works of fine art, including calligraphy, craft works, and photographs, provided they have a minimum market value of $2500. Works made for hire are excluded from the definition of works of fine art. Under this Act, the artist may waive his or her rights in writing. As amended in 1988, the Connecticut Act provides a life-of-the-author plus fifty year duration for moral rights. The provisions on removing art from buildings are similar to those in the California Act, except that in Connecticut, the artist's reservation of rights must be recorded in the state real property records.

Massachusetts [4]

Passed in 1984, the Massachusetts statute prohibits "the intentional commission of any physical defacement, mutilation, alteration, or destruction of a work of fine art." The artist retains a right of attribution and the right to disclaim authorship "for just and valid reason." If a work of fine art cannot be removed from a building without substantial alteration, the prohibitions of the Act are suspended unless a written obligation signed by the owner of the building has been recorded. If the work is capable of being removed without mutilation, then the prohibitions of the Act apply unless the owner notifies the artist and provides the artist with an opportunity for removal.

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3 1988 Connecticut Acts, Section 284.

4 Mass. Gen. Law Chap. 231, Section 86S (West Supp. 1988).

Pennsylvania [5]

The 1986 Pennsylvania Fine Arts Preservation Act prohibits destruction and establishes moral rights for protected works. Much like the California law, the Pennsylvania Act applies to works of recognized quality. In addition to special rules on removal of works of art from buildings, the Pennsylvania law excuses from liability for alteration or destruction those owners who remove works of art in "emergency situations." Conservation activities that are not grossly negligent are also not actionable.

2. **Artists' Rights Statutes.**

Louisiana [6]

Passed in 1986, Louisiana's Artists' Authorship Rights Act protects visual or graphic works of recognized quality in any medium reproduced in not more than 300 copies. Motion pictures, however, are excluded, as are works prepared under contract for advertising and trade, unless such contract provides otherwise. Rights of attribution and integrity are granted, but destruction is not covered, with the exception of art on buildings. Rights in such works are subject to a special reservation, which is required also by several other state statutes. Alterations that occur as a result of conservation efforts are not actionable unless the alteration is the result of gross negligence. Louisiana's rights attach when the work is publicly displayed.

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5 73 P.S. Ch. 31, Sec. 2101 ff.

6 Louisiana Statutes Ann. Ch. 34, Sec. 2151 et seq. (West 1986).

Maine [7]

In 1985, Maine enacted moral rights for artists of visual or graphic works without restriction as to quality. Similar to the Louisiana Act, Maine attaches the rights to public display within the state, and excuses conservation activities except for gross negligence. The artist can claim authorship or disclaim it "for just and valid reasons," which includes modification likely to cause damage to the author's reputation. No special requirements are established for removal of works of art from buildings.

New Jersey [8]

The New Jersey Artists Right Act of 1986 provides protection like that of Maine. It excludes motion pictures and makes no special provisions for removal of art from buildings.

New York [9]

In 1984, New York passed its New York Artists' Authorship Rights Act. The statute prohibits the display of an "altered, defaced, mutilated, or modified form" of a work of fine art which damages the artist's reputation. There is no explicit prohibition against destroying a work, although destruction in the context of damaging an artist's reputation might fall within the Act. The artist additionally has a right of attribution, and the right to disclaim authorship for good cause. Conservation does not

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7 Maine Revised Statutes Ann., Title 27, Section 303 (West Supp. 1988-89).

8 New Jersey Session Law, Chapter 97 (West 1986).

9 N.Y. Arts & Cultural Affairs Law, Section 14.03 (McKinney's Consolidated Laws Anno., West 1987).

constitute alteration, defacement, mutilation, or modification unless the conservation is done negligently.

Rhode Island [10]

In 1987, Rhode Island passed attribution and integrity rights legislation for works of fine art that are "knowingly publicly displayed in a place accessible to the public, published or reproduced" in that state. Its definition of works of fine art, identical to that of Maine, New York, and New Jersey, is not limited to works of recognized quality, since this term is primarily used in preservation statutes. "Alteration...of a work... resulting from the passage of time or the inherent nature of the materials," in the absence of gross negligence is not a violation of the statute.

3. **Art in Public Buildings.**

New Mexico [11]

New Mexico's Art in Public Buildings law is an example of extensive rights in a very limited area. The Act protects against alteration and destruction and provides attribution rights for works displayed in public buildings. Protection is thus limited to works that are publicly displayed by the state. The Act includes the special provisions for works of art that are incorporated in buildings. If the artist is deceased, the state attorney general is authorized to assert moral rights on behalf of the author.

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10 Bus. & Prof., Ch. 566, Secs. 5-62-2 through 5-62-6. (R.I. Gen. Laws, Michie's 1987).

11. New Mexico Stat. Ann., Section 13-4B-1 et seq. (Lexis 1989).

C. JUDICIAL PRECEDENTS

We do not have abundant moral rights case law in the United States, although some cases deal with rights that are considered equivalent to the rights of attribution and integrity. These cases bear out the conclusion that the courts, by and large, look to the intent of the contract between the disputing parties to determine the rights of attribution and integrity.

1. Attribution.

In an early case, Clemens v. Press Publishing Company, 67 Misc. 183, 122 N.Y. Supp. 206 (Sup. Ct. 1910), William Clemens sold his publishing rights in a manuscript which bore his name. Although the galleys had the author's name on them, the publisher refused to credit the author on the copy, stating that it would only publish the work anonymously. In the resulting suit, the court found that there had indeed been a contract to credit the author in the published book:

> "Even the matter of fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider a barrel of pork."

While this case is often quoted as demonstrating the presence of the right of attribution in American law, it is important to note that the court's holding was based on what it thought the parties agreed to. Thus, because third parties are not necessarily bound to observe the contractual provisions of others, the right of attribution exemplified here seems less than absolute.

Under the contract theory, the affirmative obligation to include an author's designation rather than refrain from false designation is not

secure. In Vargas v. Esquire, 164 F.2d 522 (7th Cir. 1947) the plaintiff was unsuccessful in his effort to enjoin the publication of pictures omitting his name. In the face of language in the contract that the names "Vargas, Vargas Girl, Vargas Esq.," and any and all names, designs or material used in connection thereunder shall forever belong exclusively to Esquire...to use...as it shall see fit" the court did not find any implied agreement on Esquire's part to include Vargas' name. The court specifically did not subscribe to

> plaintiff's contention that there is a distinction betweeen the economic rights of an author capable of assignment and what are called 'moral rights' of the author said to be those necessary for the protection of his honor and integrity...What plaintiff in reality seeks is a change in the law in this country to conform to that of certain other countries. We need not stop to inquire whether such a change, if desirable, is a matter for the legislative or judicial branch of government; in any event, we are not disposed to make any new law in this respect. [164 F.2d at 526.]

2. **Integrity.**

In Granz v. Harris, 198 F.2d 585 (2d Cir. 1951), the defendants sold records of shortened versions of the plaintiff's musical performance, describing them as productions by the plaintiff. The court held that attributing these versions containing unauthorized cuts to the artist constituted unfair competition, a breach of contract, and a violation of the artist's right to protect his reputation. The work, the court held, had been altered to such a degree as to no longer justify the use of plaintiff's name in connection with the work.

In a concurring opinion, Judge Frank went further than his fellow jurists:

> [T]he established rule is that, even if the contract with the artist expressly authorizes reasonable modification ... it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original.

To the same effect is another leading case, Gilliam v. ABC, 538 F.2d 14 (2d Cir. 1976), in which Monty Python, a British comedy group, licensed their scripts to be used in a BBC series. Although the license provided that only minor changes could be made without consulting the authors, BBC's license to ABC for showing on American television contained broader rights. ABC broadcast the programs on network television, but omitted 24 minutes from the 90-minute segment that was shown. The court acknowledged that the author's right to have attributed to him a work in the form in which he created it did not exist per se in this country. Gilliam's importance is that the court found that the broadcast of the truncated version violated the Lanham Act because of the potential damage an altered version poses for the plaintiff's reputation. "The public will have only the final product by which to evaluate the work," and the shortened final product did not fairly represent the authors, the Gilliam court held.

II. MORAL RIGHTS UNDER THE BERNE CONVENTION

Article 6bis of the Berne Convention (Paris Act, 1971) requires its member countries to make certain minimum moral rights available to nationals of other Berne member countries.[12] It states:

> (1) Independent of the author's economic rights and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
>
> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed....[If a country does not provide for continuation of rights when it ratifies the Berne Convention, the rights may terminate at the author's death.]
>
> (3) The means of redress for safeguarding the rights granted by this article shall be governed by the legislation of the country where protection is claimed.

A. United States Berne Implementing Legislation.

What was needed to satisfy Article 6bis of the Berne Convention became a dominant issue during our consideration of legislation necessary to make United States law compatible with Berne. Berne adherence began to

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12 The contents of moral rights required by the Berne Convention concern only attribution and integrity rights. National laws of Berne states often recognize further, additional rights. See, WIPO Glossary of Terms of the Law of Copyright & Neighboring Rights (WIPO: 1980) 161. While no state need go further than the requirements of Article 6bis, it should be stressed that where a state does so it must accord such additional moral rights to authors of other Berne states under the rule of national treatment.

gather strength after the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, a group of largely nongovernmental experts working under the auspices of the State Department, presented its report on the areas in which U.S. law remained incompatible with the Convention. Among other things, the Ad Hoc Group considered whether moral rights protection in U.S. law was compatible with Berne. It concluded that U.S. common law, state statutes, and federal unfair competition laws, especially considering the variety of ways that a country could satisfy moral rights obligations under Berne, were sufficient.

> Given the substantial protection now available for the real equivalent of moral rights under statutory and common law in the United States, the lack of uniformity in protection of other Berne nations, the absence of moral rights provisions in some of their copyright laws, and the reservation of control over remedies to each Berne country, the protection of moral rights in the United States is compatible with the Berne Convention.[13]

In the ensuing months, as Berne adherence continued to be seriously debated, this conclusion did not seem to satisfy those who were particularly anxious about moral rights.

Congress held five days of hearings[14] that dealt with moral rights in the course of Berne Convention deliberations. The Coalition to Preserve the American Tradition (CPACT), a group headed by former Register of Copyrights David Ladd, opposed adherence. CPACT objected to adherence

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13 Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 Columbia-VLA Journal of Law and the Arts (1986) 547.

14 April 16, 1986, Sept. 16, 1987, Sept. 30, 1987, Feb. 18, 1988, Mar. 3, 1988.

primarily because it believed previously non-existent moral rights would develop in the United States. CPACT took the position that to comply with Berne, the U.S. would either have to enact moral rights legislation that would inhibit magazine publishers and other corporations from making alterations without the author's consent, or the courts would change the law to conform with the literal language of Article 6bis absent new legislation.

One issue highlighted the moral rights debate: for nearly two years, directors, actors, and others made known their objections to the lack of artistic control over the colorization of motion pictures. The Directors' Guild of America was the central organization in the major fight against colorization of black and white motion pictures. In 1987 Congressman Gephardt introduced legislation to give control over colorization to directors and principal screenwriters. Two hearings were held on moral rights in this context, one in the Senate, on May 12, 1987, and one in the House, on June 21, 1988.

Although the Directors' Guild wanted moral rights legislation written into the Berne Convention Implementation Act, Congress sought to meet more immediate and limited concerns by enacting the National Film Preservation Act,[15] in which certain leading films were to be selected with the aim of collecting annually a national film heritage. Films thus selected would have mandatory labeling requirements. Where films had been colorized or otherwise "materially altered," they would have to bear a legend that the principal director or screenwriter objected to any later alteration of the motion picture.

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15 Public Law 100-446 (Sept. 27, 1988). The Librarian of Congress announced the first list of 25 films on September 19, 1989.

However, the major question, that of how moral rights would be dealt with specifically in the context of Berne legislation, was still to be resolved. Senator Hatch offered an amendment that appeared to freeze into the Berne legislation whatever moral rights existed in the United States at the time of Berne adherence. Others felt that this solution would unnecessarily restrict possible moral rights development without regard to Article 6bis. Their objective was to leave such rights free to develop or not along traditional American jurisprudential lines.

Before settling on a solution, a congressional delegation traveled to Geneva and Paris to consult with foreign experts on the Berne Convention, and in particular on the issue of moral rights. The members met with experts from Austria, England, the Federal Republic of Germany, France, Hungary, Israel, the Netherlands, Spain, and Sweden. By and large, the experts contended that moral rights would not lead to decreased access to works. The foreign experts noted the "lively and vivid cultural industry" in Europe and the small number of moral rights cases that have been brought.[16] Mr. J. A. Ziegler of France, who represented authors, was the notable exception, stating that:

> [W]ith regard to the United States in particular, my major concern is for the situation applicable to works made for hire, a highly important category of works in which authors are currently deprived of any moral right entitlement. This is doubtless a legal position which is incompatible with the

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16 Statement of Margaret Moeller, Ministerial Counselor in the Federal Ministry of Justice, Federal Republic of Germany. See Report of the Register of Copyrights on Technological Alteration of Motion Pictures and Other Audiovisual Works (March 1989) (hereafter the "Colorization Study") at 140, and generally.

> protection provided for under Article 6bis of the Berne Convention.[17]

In the end, Senator Hatch agreed to a compromise on his "moral rights freeze" proposal, and Congress adopted the following language in the Berne adherence bill:

> The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work whether claimed under Federal, State, or the common law--(1) to claim authorship of the work; or (2) to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

Floor remarks in the House and Senate accompanying the consideration and passage of the Berne bill reconfirm the United States' minimalist approach to Berne implementation legislation. We would change the law only as much as is necessary to adhere to the Berne Convention. Congress would consider new artists' moral rights legislation as a separate issue to be considered on its own merits.

B. Moral Rights Protection in Foreign Countries.

To illuminate the consideration of moral rights in the United States, we review briefly how certain other Berne countries implement such rights.

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17 The Berne Convention Implementation Act of 1987, Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee, 100th Cong., 1st & 2d Sess. 1157 (1987 and 1988).

1. France.

The French pioneered recognition of moral rights. Proud of their extensive moral rights protection, they point to moral rights as a symbol of the "idealistic nation we wish to remain."[18] There is recognition of some form of moral rights in most countries,[19] but in France moral rights are in theory perpetual, inalienable, and imprescriptible. The French law of March 11, 1957,[20] codified the moral rights that had been acknowledged in that country for more than a century. These rights include 1) the right to receive credit as author of the work, sometimes including the author's title and other qualifications, 2) the right to object to changes in the work that reflect in a derogatory manner on the author; 3) the right to have the title reflected on the work; 4) the right of first publication; and 5) the right to revise the work according to the author's current view or to withdraw the work from the public entirely. In France, the moral rights are generally considered more important to authors than economic rights, because moral rights attach to the personality of the author. Moral rights existed before, are concurrent with, and undergird the economic rights.

Inalienability

After the death of the author, French moral rights are conveyed to the author's heirs; thereafter, since the right is perpetual, officials of

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18 Jean Escarra, quoted in Colombet, Major Principles of Copyright and Neighbouring Rights in the World: A Comparative Law Approach (UNESCO) (1987) 30.

19 Id.

20 Law No. 57-296 on Literary and Artistic Property, Journal Officiel, March 14, 1957.

the state, for example, the Minister of Art and Culture, may act to protect the author's right.

Although the law provides for inalienability, where the author knows of changes and either expressly approves them or does not object in a timely manner, he or she can lose his right to do so. In Bernstein v. Matador et Pathe Cinema,[21] the court held an express waiver of moral rights to be valid. However, the waiver must be clear. Reasonable changes in contributions to collective works and adaptations are permitted without the author's consent, but waivers on future works and tacit waivers of all kinds have been consistently ruled out.[22] French law, however, allows particular latitude for necessary adaptation where the medium of expression is changed -- for example, where a novel is adapted into a stage play.

Perhaps because the concept of moral rights had been settled for many years, the French law of 1957 is not detailed. The legislators may have needed only to indicate generally the characteristics of the moral right. Nevertheless, there is a basic difference between civil and common law in that the primary objective in the French courts is to interpret the statute.[23] The statute is supreme, while the precedent of prior cases is

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21 Recueil hebdomadaire de jurisprudence Dalloz (D.H.) (1933), 533. Droit d'Auteur (D.A.) (1933) 104.

22 Blanchar, Honegger and Zimmer v. Soc. Gaumont, Gazette du Palais, July 20, 1950, Cour d'App., Paris.

23 The core of the French law is stated in Article 1:

> The author of an intellectual work shall, by the mere fact of its creation, enjoy an exclusive incorporeal property right in the work, effective against all persons. This right includes attri-

not as binding as it is under the common law. This approach may result in different opinions in furtherance of the same objective.[24]

As noted above, although the law itself defines the boundaries of the particular right or duty in civil law countries, French law gets its moral rights interpretation from its courts, which since the early twentieth century have earned France its reputation as the foremost defender of those rights.

In Chaliapin v. Russia and Bremer, the Paris court of appeals declared its opinion about what ought to be the scope of moral rights:

> butes of an intellectual and moral nature as well as attributes of an economic nature, as determined by this law.

Article 6 of the French statute states:

> The author enjoys a right to respect for his name, his status and his work. This right is attached to his person. It is perpetual, inalienable and imprescriptible. It may be transmitted at his death to his heirs. Its exercise may be transferred to another by virtue of testamentary provisions.

Article 19 gives the right of disclosure of the work to "the author alone" and can be exercised posthumously by those who benefit from the author's testamentary legacy.

Article 32 gives the author a right after publication to withdraw or to modify the work against any transferee, after the author has first indemnified the transferee for any accompanying loss from withdrawal or modification of the work. If the author decides to return the work to the public, he must offer it again to the previous transferee under the same conditions orginally agreed upon.

Article 56 provides that the publisher may not make any modifications without the consent of the author.

24 Lewis, 'Droit Moral' in French Law, 12 European Intellectual Property Review (1983) 341.

"Every author has a moral right in his work and thus must be recognized by the courts in all countries. The author has the right to prevent that his work be altered or mutilated in form or spirit."[25]

Attribution

The French courts have enforced both the positive right to have one's name appear on his or her work and the negative right to prevent use of the author's name on a mutilated version of the work.[26] In "Bernard Frank" v. Bernhard Frank,[27] the court held that a writer who had become known under a pseudonym could not prevent a lesser known writer from using his real name on his works.

Integrity

In a landmark case brought by Jean Francois Millet in 1911, the Civil Tribunal of the Seine said that a work must be "protected and kept as it emerged from the imagination of its author and later conveyed to posterity without damage from the acts of individuals with dubious intentions granted by some transient fashion or profit motives."[28]

A more widely reported case involved Bernard Buffet's Refrigerator.[29] Buffet had painted a set of scenes entitled "Still Life with Fruit"

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25 Ct. App. Paris, July 28, 1932, Recueil Periodique Mensuel Dalloz, (1934) 2.139.

26 See, e.g. Civil Tribunal Seine, March 12, 1836; Civ. Trib. Seine, August 7, 1868; Fleg v. Gaumont, Civ. Trib. Seine. Feb. 20, 1922, Gaz. Trib. (1922) 2.282.

27 Civ. Trib. Seine, Dec. 7, 1955.

28 Quoted in Daniel, "When Art Owners Violate Artists' Moral Rights", Christian Science Monitor, April 20, 1981, 23.

29 Gaz. Pal. September 4-17, 1965.

on six panels of a refrigerator. The artist then gave the refrigerator away for charitable purposes, whereupon the transferee advertised the individual panels for sale one by one. In Buffet's suit, the court held that the work, which Buffet signed only once, was a single unified work. Thus, the offer to sell the panels separately violated Buffet's moral right; as an author, he had a right to ensure that his work was not mutilated. The award in this case illustrates that the controversy is about something entirely apart from money: the court awarded plaintiff a damage award of one franc.

Recent cases show that the French courts are continuing to give a high level of protection to authors' rights. In DuBuffet v. Renault[30] the author was able to compel completion of a work after the commissioning organization decided the project was going to cost more than it wanted to invest. The court here seems to have found an implied contract to complete the architectural work.

An author of a collective work was found to have moral rights so as to prevent the indexing and abstracting of Le Monde, a Paris newspaper, without the author's permission. Although the authors of the articles had copyright in their works, the court said the newspaper editors had contributed additional authorship through the selection, editing, and arrangement of the articles to produce a cohesive whole. Thus, aside from the authors' rights in the individual articles, the preparation of indexes and abstracts violated the moral rights of the editors of the newspaper as a whole. However, the Court of Cassation quashed this decision of the lower court, holding that "the author of the quoted work cannot prove any violation of

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30 1982 E.C.C. 463 (1983) F.S.R. 110.

his moral right merely by asserting that the work in which the quotations appear is of poor quality."[31]

In the most recent decision, a French court has refused relief to the heirs of John Huston for the colorization of The Asphalt Jungle.[32] On two earlier occasions, in proceedings held by the Tribunal de Grande Instance and in the Court of Appeals of Paris 14th Section, the courts had enjoined the colorized version of Asphalt Jungle from being broadcast by Le Cinq (Channel Five) on French television.[33]

In the defendant's view, the original work (the black and white film) was left intact -- it was not modified itself; color was merely added to create a new version (the computer-colorized work). The ruling of the lower court in favor of Huston's heirs was reversed on appeal, apparently on the primary ground that Huston does not have the status of an author of Asphalt Jungle under United States law since Huston was an employee and the

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31 Cass. Civ. (Nov. 9, 1983), noted in Le Stanc, Databanks and Copyright: The Case of Microfor v. Le Monde, 12 EIPR 345 (1985).

32 Decision of July 6, 1989, Court of Appeal of Paris, 4th Chamber, section B. The French authors in the International Literary and Artistic Association who sought creation of the Berne Convention, favored a policy of granting copyright to authors from other nations as a matter of natural right as opposed to entitlement based on reciprocity. Both major international conventions grant copyright to member states based on national treatment; the rights a foreign national of a member state receives are based on the national law of the country where protection is sought. Thus American creators in theory receive protection under the French law to the same extent that French authors receive protection in their own country. Likewise, a French author receives in American courts the same protection American citizens receive here.

33 Article 14 of France's copyright law gives directors of a motion picture the status of author (or co-author). Under French law, the author must be a natural person. The concept of corporate bodies as authors does not exist there.

work was made for hire. The court applied U.S. law because the parties to the contract for the creation of the film were American and the film was an American production.

Although no firm generalizations can be drawn from this small smattering of cases, three tentative concepts seem to emerge. (1) France seems to consider moral rights so fundamental that authors are entitled as a matter of natural right to such protection. (2) Even though the rights are extensive, moral rights in France are shown to be able to accommodate practical use by being sufficiently adaptable to fit special situations (e.g., computer programs). In addition, latitude in exercising adaptation rights is acknowledged where the author has authorized a change in the medium of expression, for example, from a novel to a motion picture. (3) Lastly, the damages awarded to the plaintiffs have never been particularly large, so that the controversies themselves seem not to encourage profiteering. The tradition, in fact, is to request nominal damages of one franc.[34]

Finally, the parties -- authors and copyright owners and other transferees and users -- seem to know how to operate within the law without paralyzing the wheels of commerce. Particularly surprising is the fact that the right that seems to be the most potentially troublesome at first blush, the right to withdraw a work from the public and revise the work,[35] has not lived up to its negative expectations. This may be because of the concomit-

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[34] See, Lewis: The "Droit Moral" In French Law, 12 EIPR, (1983) 341. As for injunctive relief, the author states that only once has the court sustained an author's moral right through an injunction against the assignee of the economic rights.

[35] This right is not required by the Berne Convention.

ant requirement that the licensee or other transferee be indemnified before the author can exercise this right.

The perpetual nature of French moral rights has drawn the most criticism. Most countries appear to favor a term of moral rights that runs concurrently with the copyright term.[36] Moreover, at some time, society may want to encourage modification of old artworks as long as the preservation of the original is not threatened. This viewpoint has some expression particularly in Anglo-American copyright law, where the fears of a monopolistic concentration of copyright ownership are coupled with a political philosophy that, after a suitable period of protection, all works should be dedicated to the public without constraint.

It has been noted that the greatest complaint against the French law is that it is unclear. The imprecise nature of the rights thus makes corporate copyright owners apprehensive that this system places too much reliance on skilled oratory in court.[37] From the author's point of view, however, the French law is superior on a number of fronts. For example, while the U.S. law does protect an author's right to introduce a work to the

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36 It should be stressed that limiting moral rights to the term of economic rights does not mean the absence of any legal protection for a public domain work. It means only that any basic source of post-copyright protection must be found outside of the framework of authors' rights, such as preservation and antiquities laws or unfair competition and similar forms of intellectual property not limited in time.

37 Lewis, The Droit Moral in French Law, 12 EIPR (1983), 341; 1 EIPR (1984), 11.

public, it does not provide a right to revise or withdraw it after publication.[38]

2. West Germany.

The Federal Republic of Germany copyright law provides for moral rights in Articles 11-14.[39] Article 11 provides generally for both paternity and integrity rights. Specifically, the author is given a right of publication -- that the author may determine how and in what circumstances his work may be first disseminated. Article 13 recognizes the author's right to have his name on the work. The author has the right also to decide to remain anonymous or to be designated on the work pseudonymously. Under Article 14, the author obtains the right to prohibit any distortion or other mutilation "which would prejudice his lawful intellectual or personal interests in the work."[40]

These rights are part of the general copyright law and are therefore governed by the provisions of copyright law respecting all similar other rights. Therefore, the copyright law in general provides that while moral rights are not alienable, exclusive licenses are possible. Copyright may be transferred after death, and it would follow that moral rights can be conveyed by testamentary disposition but not otherwise. Additionally, if

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38 See Dubuffet v. Renault, Paris Court of Appeal, June 2, 1978, D. 14 1979; Cassation, January 8, 1980, J.C.P. 1980, 19, 336; Versailles Court of Appeal, July 8, 1981.

39 Law of 1965, reprinted in UNESCO, Copyright Laws and Treaties of the World, (Supplement 1974).

40 Id.

the author has agreed to remuneration that turns out to be disproportionately low compared to revenue that the work earns, the author may vary the contract for a more equitable share of income. Another facet of the German law, which was introduced in the mid-1950s, is the right of first publication, now considered essential to the author's moral right. It appears that neither the paternity nor the integrity rights are limited to public display.

The term of protection is life of the author plus 70 years. In addition to the rights of paternity and integrity, German law allows the author, even if he or she is an employee for hire, to revoke permission to use the work if it no longer represents his or her convictions. However, the author or employee must indemnify the transferee in case of any loss. The law appears to make all rights unwaivable in advance, and licensees may not alter titles, the designation of authors, or the content of a work, except for modifications which the author "cannot in good conscience refuse." The exploitation of cinematographic works may proceed in the absence of gross distortion, as long as the respective legitimate interests of other persons are taken into account. The moral rights apply to foreign nationals of member countries except that there is a requirement of reciprocity for foreigners to receive resale royalties.

In the landmark "Rocky Island With Sirens" case, an individual commissioned a painting of nude sirens on his staircase wall. However, the defendant tired of the mural, and had clothing painted on the sirens. In the ensuing lawsuit, the court held that the artist had the right to present his work in unaltered form. Therefore, it was a violation of plaintiff's

moral right to change the work even though the defendant, as the owner of the painting, could have destroyed it.

In addition to being prohibited from making changes in the work, under German law generally, the assignee is not permitted to change its title or its authorship statement. Where a publisher interspersed critical comments in a periodical article, the court found that the contract had been breached; the defendant was not permitted to distort the sense of the plaintiff's work.

In Maske in Blau, 55 BGHZ 1 (1970) the court held that a theater proprietor who was licensed to produce an operetta violated the composer's and librettist's rights in alterations that distorted the intent and mood of the original work. The licensee had deleted parts of the score and introduced elements that were not at all connected to the original work (for instance, the Dragnet theme). The court took great pains to explain the creative freedom that the producer must have, but found for the creator based on the nature of the alterations.[41]

Like those of France, Germany's copyright laws are given the term "author's rights" (Urheberrecht). Philosophically, therefore, they may be seen as different from laws termed "copyright." Consistent with the theory, German law grants authors a wide range of moral rights, which are,

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41 Reported in Goldstein, 14 International Review of Industrial Property and Copyright Law (IIC), at 57.

in principle inalienable except for disposition on the author's death, but the West German law appears to defer more to contractual agreements.[42]

Although the German law on the core moral rights is not very detailed, other provisions regulate use by licensees. With respect to adaptations for film, the law provides that the author can prohibit "only gross distortions or other gross injuries of their works or of their contributions." (Article 93) Considered an advanced legal system, moral rights laws in West Germany have not been criticized for lack of sufficient clarity.[43] Nor have harmful effects on industry been reported.

West Germany has eschewed perpetual moral rights for a term of protection identical to their copyright term. Compared to that of the United States, West German law provides more expansive rights, and West German courts have provided superior moral rights protection in the few reported cases.

3. The United Kingdom.

In 1988, after announcing its commitment to do so, the United Kingdom enacted moral rights into English law.[44] For some time, the obligation of the Berne Convention Paris Act had caused Great Britain to question whether its moral rights law was sufficient. Four Government reports -- the Gregory Report, the Whitford Report, the 1981 White Paper, and, finally, the

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42 Goldstein, Adaptation Rights and Moral Rights in the United Kingdom, the United States and the Federal Republic of Germany. 14 IIC, 43, 54 (1983).

43 See generally, Stromholm, 14 IIC 1 (1983).

44 Copyright Designs and Patent Act of 1988.

1986 Green Paper -- considered the question of moral rights sufficiency. In the last two reports, the government concluded that, whether or not the case law met the requirements of the previous Berne Acts, the Paris Act of 1971 required statutory moral rights provisions.

The term of moral rights is the same as that of the copyright term -- life plus 50 years following the death of the author, with the exception of false attribution, protection against which expires 20 years after the author's death. Parliament decided to make the moral right assignable, but commentators wonder aloud whether "the scales may have been tilted too heavily against the author's droit moral, leaving him with much less than he would at first sight appear to have."[45]

The Paternity Right

The new uniform moral rights law is unlike those in civil law countries in several respects. Generally, the law provides that consent and waiver, including informal waiver according to the general law of contract, are acceptable. Not only are rights made waivable, they also must be asserted to be claimed.

In addition, in order for someone other than an assignee or one claiming through him to be bound by the obligation to observe the paternity right, that party must have notice of the claim. The paternity right is subject to laches. The right to be identified is subject to exceptions; authors of computer programs, typeface designs, computer-generated works, motion pictures or other works made for hire are excluded. In addition, works used in a fair use context, for example, in news reporting, statutory

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45 Dworkin, Moral Rights in English Law -- The Shape of Rights to Come, 11 EIPR 329, 330 (1986).

inquiries, or before Royal Commissions, do not need to identify the author.

The U.K. law provides for both positive and negative paternity rights. The right against false attribution is a staple fixture in English law, the new statutory right terminates twenty years after the author's death, unlike the other moral rights, which endure for the life of the copyright.

Integrity

The U.K. law establishes the right to object to derogatory treatment of a work. This right is further subject to the qualification that the distortion or mutilation must be prejudicial to the honor or reputation of the author or director, as is the case with the Berne Article 6bis requirement. Moreover, a translation of a literary or dramatic work or an arrangement or simple transposition of a musical work is excluded from consideration as derogatory. A work may be subjected to derogatory treatment by publication, public exhibition, or performance. The right of integrity for models, architectural works, sculpture, or works of artistic craftsmanship may be infringed by issuing two-dimensional copies or photographs representing derogatory treatment of the work, but the only remedy for such treatment of an actual work of architecture is that the author may require that his or her name be removed.

Motion picture authors and directors receive fairly substantial rights. Article 80(6) provides:

> In the case of a film, the right [to object to derogatory treatment] is infringed by a person who--
>
> (a) shows in public, broadcasts or includes in a cable programme service a derogatory treatment of the film; or

> (b) issues to the public copies of a derogatory treatment of the film, or who, along with the film, plays in public, broadcasts or includes in a cable programme service, or issues to the public copies of, a derogatory treatment of the film soundtrack.

Films are also, however, subject to substantial qualifications and exclusions. In addition to fair use exclusions, and the possibility of disclaimers or waivers, the copyright owner has broad authority to revise the work unless the author has been identified on copies of the work.

The right of integrity may be infringed by persons who knowledgeably possess, distribute, or deal commercially with works that infringe this right, even though the possessor him or herself has not taken any derogatory action toward the work.

Comments on U.K. Law.

The new moral rights law of the United Kingdom is detailed. It remains to be seen how the judiciary will react to this very complex law.

One basis for the position that U.S. law is compatible with Article 6bis of Berne was that the U.K., a prominent member of Berne with a system similar to that of the U.S., had no explicit moral rights legislation. Countries in the common law tradition could be said to have carved out moral rights protection through other legal theories.

The status of the United Kingdom as a major bastion of non-copyright moral rights changed when they adopted their statute last year. U.K. law is now specific.

According to some commentators, the real reason the United States could join Berne without concern about moral rights noncompliance was that there was already substantial noncompliance with Article 6bis on the part

of several other Berne member countries. However, the noncompliance of others seems a tenuous base for continuing United States "compatibility."[46]

III. THE VISUAL ARTISTS RIGHTS ACT OF 1989

A. Basic Provisions of S. 1198.

The Visual Artists' Rights Act of 1989 would amend the copyright law by creating a new section 106A establishing new moral rights of attribution and integrity.

Section 2 of the bill adds to the definition section of title 17 the phrase "work of visual art," which is a new subcategory of pictorial, graphic and sculptural works. Included in this new subcategory are original paintings, drawings, prints, and sculpture existing in a single copy, or limited editions of no more than 200 copies, and still photographs produced for exhibition. Excluded are works of applied art and audiovisual works, including motion pictures. Technical works, merchandising items, books, magazines, periodicals, or similar publications are also excluded, as well as works that are made for hire and "works" not subject to protection under the Copyright Act.

Section 3, the nucleus of the bill, grants the author the rights of attribution and integrity, independent of copyright ownership. Under this section, the author of a work of visual art receives the right to claim authorship and to prevent use of a person's name on a work he or she did not create. Authors are also given the right to prohibit use of their name on a work of visual art in the event of distortion, mutilation or other

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46 Ginsberg and Kernochan, "One Hundred and Two Years Later: The U.S. Joins the Berne Convention," 13 Columbia-VLA Journal of Law & the Arts (Fall, 1988), 1.

modification of the work. The author would also have the right to prevent any distortion, mutilation or other modification of the work which would be prejudicial to the author's honor or reputation. Any intentional or grossly negligent distortion, mutilation or other modification of a work is expressly declared to be a violation of the integrity right, apparently without further proof that the change is prejudicial to honor or reputation. Finally, section 106A(a)(3)(B) creates a right against the destruction of works of recognized stature and sets up criteria for determining whether a work is of such stature.

S. 1198 expansively extends the new visual artists rights to all authors, irrespective of nationality or place of publication. Thus a foreign author need not be eligible for copyright protection in the United States in order to claim moral rights under section 106A.

Like the more recent state laws, conservation and deterioration through time is not actionable unless it is caused by gross negligence.

Under proposed section 106A(e), the moral right is not waivable,[47] but can be transferred on the author's death by bequest or by intestate succession.

All rights created by S. 1198 would endure for the copyright term. Works published before the effective date of the act are not covered in an effort to avoid constitutional due process problems relating to a taking without compensation. Such a problem might arise where a transfer of

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47 The waiver provision represents a major difference between the House and Senate bills. H.R. 2690, the companion bill in the House, allows waiver of the moral rights granted by SEC. 3 of the bill.

rights has been made and the value of the work transferred might be reduced if the bill were to take away the transferee's right to modify the work.

Proposed section 106A(e)(3) clarifies that ownership of moral rights is distinct from ownership of the physical object and that transfer of ownership of the physical fixation of the work does not transfer with it any of the author's moral rights.

Section 4 of the Visual Artists' Rights bill would add a new subsection (d) to amend section 113 of the copyright law to provide for a waiver of moral rights in connection with removal of works of visual art that have been made part of a building. As a prerequisite to this waiver taking effect, however, the artist must sign a consent to the installation of such work. An author who wishes to insure his or her right to remove such works must assert the right in a written agreement signed by the building owner. To bind a subsequent owner absent actual notice, the artist must record the agreement in the state real property records prior to the transfer to the subsequent owner. Where a work can be removed without harm, the building owner must attempt to notify the artist and give him or the successor of the artist's moral rights 90 days to remove the work.

Section 5 would amend section 301 of the copyright law to preempt all rights equivalent to those provided in the bill except for causes of action commencing before the effective date, and except for works published before the effective date of the act.

Proposed section 6 would exclude criminal penalties for violations of the attribution and integrity rights. It would also exempt authors of works of visual art from the present requirement under section 412 of registering the work in order to be entitled to sue for statutory damages

and attorney's fees for violation of moral rights. The work would be registered, it is presumed, by the copyright owner, if the country of origin is the United States.

Section 7 provides the same three year statute of limitation term as for copyrights, and further provides that the claim accrues when the author knows or should know of the moral right violation.

Section 8 makes fair use defenses applicable to artists' rights.

Section 9 directs the Copyright Office, in consultation with the National Endowment for the Arts, to conduct a study on resale royalty rights and alternatives thereto. The study would be scheduled for presentation to Congress within 18 months after the date of enactment.

B. Comments of the Copyright Office.

The Copyright Office supports moral rights for visual artists and for all creators, but we note the somewhat less controversial nature of such rights for visual artists. The bill presents no costs to either the consumer or to industry. Galleries have no interest in defacing works, and the bill protects all conservation activities, except those which constitute gross negligence. Consideration of moral rights on a larger scale may bring into question the issue of works made for hire, which are excluded from this bill. As a practical matter, most works described in the bill are not usually created for hire.

The Office supports the bill's preemption of state moral rights on a prospective basis.

The bill deals with works of visual art in a consistent and uniform manner. A single federal system is preferable to state statutes or

municipal ordinances on moral rights because creativity is stimulated more effectively on a uniform, national basis. Visual art works are not bound to any one location. Interstate movement of such works presents questions of conflict of laws, vesting, and other issues that make negotiations under multiple state laws unnecessarily complex.

By bringing moral rights under the federal copyright law, the bill clarifies compatibility with Article 6bis of Berne. However, because some of the state laws may be more extensive than the federal visual artists rights, the federal law should not preempt those laws insofar as they grant greater rights. In terms of subject matter, H.R. 2690 seems to be worded carefully so that preemption only occurs "with respect to works of visual art to which the rights conferred by Section 106A apply."

S. 1198 brings U.S. law into greater harmony with laws of other Berne countries. Numerous developed and developing countries provide by positive law for moral rights. Enactment of moral rights legislation serves another important Berne objective -- that of harmonizing national copyright laws.

The Copyright Office has doubts about the nonwaivability provision.

Freedom of alienation and contract are longstanding common law traditions. We understand the concern that the failure to provide for an unqualified right of authors may mean that only those authors who have sufficient bargaining power will be able to preserve their moral rights. Congress may want to allow waivability for several years to determine whether waivers become so commonplace as to negate the moral rights in practice. The waivability provision could be sunset in perhaps five years.

Another alternative might be to provide for waivability under certain strict conditions, for example, to provide that certain integrity rights may be waived, for instance, but not the attribution right.[48]

The Office has concerns also about the destruction right for visual art works of recognized stature. The bill seems to create a per se standard in the case of "any intentional or grossly negligent destruction," but the meaning of the preceding phrase's reference to "any destruction" is unclear. Is only intentional or grossly negligent destruction actionable, or can the artist also seek to prove that honor or reputation is harmed by unintentional destruction? The Office recommends reconsideration of this provision. Perhaps a per se standard could be justified in the interest of preservation, but section 106A(a)(3)(B) should be clarified.

The subcommittee should reconsider extending protection to foreign artists, irrespective of nationality or where their works are first published. Works of visual art are often unpublished. As such they are eligible for protection under 17 USC 104(a). Such unpublished works, of course, ought to enjoy the benefits of the bill. They now enjoy all the other benefits of the Copyright Act. But when a work is first published, then, some basis in treaty, bilateral, multilateral or Presidential Proclamation, must exist for protection under the existing copyright law.

S. 1198 extends moral rights to published works of the visual arts whose authors are not nationals of states with whom the U.S. enjoys copyright relations, or which were not first published in such a state. This

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48 Another alternative would be to adopt the approach of the House bill, H.R. 2690. Under this bill, the author must expressly waive any rights in a written instrument, which must specifically identify the work and the particular uses of the work to which the waiver applies.

step is generous. It may set a fine example for artists rights everywhere. It may also be problematic in practical terms.

For example, where there is no copyright in a work due to ineligibility, the existence of moral rights could create a de facto copyright. Adaptations or modifications of works of art in our public domain could be challenged on the basis of the federal moral right.

Further, if the duration of moral rights is linked to copyright, it is unclear how this would apply to works ineligible for copyright protection under 17 USC 104.

Congress may decide the public policies underlying moral rights for the visual arts supercede limitations applied generally to protection of foreign works. On the other hand, should Congress condition moral rights in the visual arts upon eligibility under 17 USC 104, the situation will be as follows: 1) federal moral rights will exist in respect of unpublished works of the visual arts, regardless of the nationality of the author; 2) absent a basis for protection under 17 USC 104, foreign artists will enjoy moral rights in published works under the common law or other federal laws (where considerations of nationality or place of publication may not come into play), only to the extent the rights are not preempted by amended section 301 of the Copyright Act.

Finally, the bill makes full statutory damages and attorney's fees available for infringement of artists' moral rights without requiring the artist to register a claim to copyright in the work. Congress may want to consider the wisdom of this exception to the general principle that extraordinary remedies are available only to registered works. The Copyright Office would support a requirement that the work must be regis-

tered to get the benefit of statutory damages and attorney's fees. The author of a work may register the work, even without the consent or participation of the owner of the copyright.

C. Impact on the Copyright Office.

S. 1198 assigns the Copyright Office two recordation functions. In order to acquire moral rights for an unremovable work incorporated in or made part of a building, an artist must make a written agreement with the owner of the building. If the work can be removed without damage, the owner must attempt to notify the author and give him or her 90 days to remove the work. The Copyright Office must establish a system under which the artist may record and update his or her identity and current address. The Office must also establish procedures under which an owner of a building may record efforts to notify the artist (or successors in interest) of the owner's wish to remove the work of art from the building. No explicit fee is designated for providing these services.

Section 708 of Title 17 specifically designates the fees for most services of the Copyright Office. Services not specifically designated, however, may fall within catch-all subsection (a)(11), which confers authority to set fees "for any other special services requiring a substantial amount of time or expense, ... as the Register of Copyrights may fix on the basis of the cost of providing the service." The Copyright Office believes this provision could be invoked to allow the Copyright Office to charge for the cost of establishing the authors' identity, registry and other records proposed in S. 1198. Budgetary considerations would preclude hthe Office from offering the services for free.

The Office is also directed to conduct a study of the feasibility of resale royalties and alternatives thereto in consultation with the National Endowment for the Arts and other appropriate agencies of the United States Government, interested groups in the private sector, and foreign governments. Legislative provision should be made for the funding of these studies and the budgetary impact reported in the legislative history. We will be happy to provide cost estimates.

I hope my comments will assist the Subcommittee in its deliberations. The Copyright Office remains available for any further inquiries or requests for assistance you may have.

COPYRIGHT MORAL RIGHTS: WORK MADE FOR HIRE (S. 1253) AND MORAL RIGHTS IN PUBLISHING, PHOTOGRAPHY, AND GRAPHIC ARTS

WEDNESDAY, SEPTEMBER 20, 1989

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS,
Washington, DC.

The subcommittee met, pursuant to recess, at 10 a.m., in room 226, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the subcommittee) presiding.

Also present: Senator Hatch.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. The Subcommittee on Patents, Copyrights and Trademarks will come to order.

I am pleased once again today to convene the hearings by this subcommittee on a subject of vital importance to the copyright community. Today's hearing is the second in a series of three hearings on moral rights and the copyright laws. The specific issue today is moral rights in the publishing industry.

In addition to the general subject of moral rights we will also discuss the specific topic of work for hire and Senator Thad Cochran's bill, S. 1253, to further refine its application to the copyright law.

During last year's consideration of the Berne Convention implementing legislation, Senator Cochran proposed to offer an amendment incorporating his legislation amending the work for hire provision of the Copyright Act. Senator Hatch and I asked him at the time to postpone offering that amendment, and promised him that we would schedule a hearing on the issue in this subcommittee promptly during the session of this Congress. Senator Cochran graciously consented to our request and has worked closely with our staff so that we could put together the hearing today.

We agreed to schedule a hearing after the Supreme Court had decided Community for Creative Non-Violence versus Reid, and to permit the parties affected by that decision to have enough time to analyze and understand it. I am hopeful that today's discussion will help the subcommittee understand better the effects of that decision on the publishing industry.

I would like to thank Senator Cochran for his hard work and leadership in this area. He has shown great perseverance and devotion to the problem that artists face when dealing with publishers

of books, newspapers, and magazines. I believe that the bill that he has offered this year is more narrowly written than previous legislation on the subject matter. I am undecided as to whether any changes need to be made in the work for hire area, but I do look forward to working with Senator Cochran and others who have expressed interest as the subcommittee explores this issue and the significance that it may have. I congratulate you, Senator Cochran.

The work for hire provision of the Copyright Act determines the ownership of copyright of a work which is produced by an artist for use by another. If the work qualifies as a work for hire work, the Copyright Act considers the copyright owner to be the party for whom the work was produced.

There are two categories of work for hire in the act. The first is works prepared in an employer-employee relationship. The second category covers nine specific categories of work which are specifically ordered or commissioned under an express written work for hire agreement.

The Supreme Court decision in CCNV versus Reid narrows the circumstances in which a work is considered to be a work for hire. S. 1523 attempts to answer several questions about the provisions unanswered by the Supreme Court in its decision. Among these are the proper definition of the term "employee," and what kind of agreement satisfies the act's requirement of an express written or signed instrument.

These are complicated and contentious issues. As is usual in copyright issues, there is a great deal of mistrust and suspicion between the parties, and some misunderstanding. I have found, however, that the two sides in these disputes need each other in order to succeed.

I hope that today's hearing, with the distinguished and knowledgeable group of witnesses, will provide an opportunity to understand and find some accommodation on these particular issues. I look forward to the discussions and to working with Senator Cochran and Senator Hatch and others regarding this legislation to see what we can do if legislation is necessary, and what we can do to create a better environment and atmosphere.

With that I yield to my friend from Utah, Senator Hatch.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman. I am happy to be here today. I welcome all of the distinguished witnesses who are going to testify here today, and especially Senator Cochran.

I think this is an important hearing. I believe that the principal purpose of our copyright law should be to achieve and secure and maintain the rights of artists, writers, and other creative individuals. If we don't do that, we really won't be accomplishing the constitutional mandate that we have to accomplish in this society.

The purpose of the act is not to protect those who would seek a profit from the efforts of those creative artists. When the copyright law succeeds in the goal that I've suggested, it seems to me that everybody benefits, because the artists are given the necessary in-

centives and the freedom to create those great works of art which enhance all of our lives.

Therefore I am really happy to have the opportunity of being at today's hearing and listening to all of the witnesses, and to examine again the adequacy of the Copyright Act's protection of the rights of all creators who may be engaged in work for hire endeavors, as well as to examine the specific problems and concerns of writers, publishers, and graphic artists on the question of moral rights for writers and artists.

As to the proposed bill, to alter the statutory definition of works made for hire, S. 1253, this bill raises a principal concern to me. That principal concern is the same that I have expressed before. Would the proposed change in the law increase or decrease the opportunities available for creative artists?

While I have an open mind as to the advisability of this legislation, I have to add that in my opinion the proponents of this bill must address the impact of the Supreme Court's recent decision in Reid versus CCNV. The holding in that case appears to have given the advocate of a tighter definition of "work made for hire" the victory, that their particular bill was seeking to achieve. Moreover, by specifically rejecting the formal salaried employee alternative, which was also advanced in the Reid case, the Supreme Court has given to us a cogent explication of the reasons why the common law agency approach, which Reid adopted, is to be preferred.

I am also concerned, as I am with most Supreme Court decisions, that we not act hastily to counteract the effect until that effect can be seen in the marketplace. On the other hand, if I can be shown how we can better protect artists and creative people, I will be happy to do whatever it takes to get that done.

I intend to consider carefully, first, the need for this legislation, and second, the efficacy of this bill to meet the needs of the creative community. Bearing both of these considerations in mind, I look forward to listening to our witnesses today and I look forward to working on this with you, Mr. Chairman. Before we get through I hope we can do what is best for all concerned, but most of all for those who really deserve the right of copyright protection.

[The prepared statement of Senator Hatch follow:]

OPENING STATEMENT OF SEN. ORRIN G. HATCH
SEPTEMBER 20, 1989

Thank you, Mr. Chairman, for holding this hearing today. I believe that the principal purpose of the copyright law should be to secure and maintain the rights of artists, writers and other creative individuals. The purpose of the Act is not to protect those who would seek to profit from the efforts of those creative artists. When the copyright law succeeds in this goal, we all benefit, as artists are then given the necessary incentive, and freedom, to create those great works of art which enhance all of our lives. Therefore, I am glad to have the opportunity, which today's hearing presents, to examine again the adequacy of the Copyright Act's protection of the rights of all creators who may be engaged in work-for-hire endeavors as well as to examine the specific concerns of writers, publishers, and graphic artists on the question of moral rights for writers and artists.

I am interested in preserving a copyright law that stimulates and encourages artists. For that reason, I am generally opposed to the imposition of "moral rights" concepts by federal statute rather than through the bargaining of the parties to a transaction.

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Unfortunately, many who question the entire concept of so-called "moral rights" for artists and writers, are sometimes accused of being insensitive to the interests of the creative artists. Nothing could be further from the truth. The objections that have been raised concerning the introduction of moral rights concepts into American law are based on the very real concern that such legislation might depress the healthy American literary and art markets and might dry up available commercial opportunities for young contemporary artists and writers.

By any measure, the current American markets for copyrightable material -- whether it be literary or artistic -- favor the interests of artists and writers more than do the markets of any other country, particularly those European nations which have most fully embraced the concept of noneconomic "moral rights". The general market in this country for works of creative individuals is undeniably healthy -- for established artists and writers, the market is truly booming. And, I would add, it was the consensus opinion of the witnesses who earlier testified before this subcommittee in its hearings on visual artists that it is the established artists whose interests are most clearly favored by "moral rights" legislation.

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As to the proposed bill to alter the statutory definition of "works made for hire," S. 1253, my principal concern is the same: would the proposed change in the law increase or decrease the opportunities available for creative artists? While I have an open mind as the advisability of this legislation, I must add that, in my opinion, the proponents of this bill must address the impact of the Supreme Court's recent decision in Reid v. CCNV. The holding of that case appears to have given the advocates of a tighter definition of "work made for hire" the victory that their bill was seeking to achieve. Moreover, by specifically rejecting the "formal, salaried employee" alternative which was also advanced in the Reid case, the Supreme Court has given us a cogent explication of the reasons why the common law agency approach, which Reid adopted, is to be preferred.

I am also concerned, as I am with most new Supreme Court decisions, that we not act hastily to counteract its effect until that effect can be seen in the marketplace.

So I intend to consider carefully, first, the need for this legislation, and, second, the efficacy of this bill to meet the needs of the creative community.

Bearing these considerations in mind, I look forward to hearing today's witnesses.

Senator DECONCINI. Thank you, Senator Hatch.

Now I would like to place in the record a statement submitted by Senator Grassley.

[The prepared statement of Senator Grassley and a copy of S. 1253 follow:]

STATEMENT OF CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

I would like to thank Senator DeConcini for conducting this hearing on the proposed work for hire legislation, S. 1253 and the larger issue of moral rights.

Moral rights is a new concept to American law. I have questions regarding whether this new concept would indeed be very foreign to our free enterprise, free market system. When we consider introducting moral rights into American law we must at once consider the very ternants of this Nation's property and contract law.

I welcome the opportunity at this hearing to further study these issues.

II

101ST CONGRESS
1ST SESSION

S. 1253

To amend the copyright law regarding work made for hire.

IN THE SENATE OF THE UNITED STATES

JUNE 22 (legislative day, JANUARY 3), 1989

Mr. COCHRAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the copyright law regarding work made for hire.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 101 of title 17, United States Code, is amended—

(1) by amending clause (1) and the first sentence of clause (2) of the definition, "work made for hire" to read as follows:

"(1) a work, other than a specially ordered or commissioned work, prepared by a formal salaried employee within the scope of his or her employment; or

"(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of

a motion picture or other audiovisual work, as a translation, as a supplemental work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if, with respect to each such work, the parties expressly agree in a written instrument signed by them before the commencement of the work, that the work shall be considered a work made for hire.";

(2) in the definition of "joint work", by striking out "their contributions" and inserting in lieu thereof "their original contributions"; and

(3) by adding before the period at the end of the definition of "joint work" the following: ", provided that, in the case of each specially ordered or commissioned work, no such work shall be considered a joint work unless the parties have expressly agreed in a written instrument, signed by them before the commencement of the work, that the work shall be considered a joint work".

○

Senator DECONCINI. Senator Cochran, we are pleased to have you here. You may proceed; if you would summarize your testimony, please.

STATEMENT OF HON. THAD COCHRAN, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator COCHRAN. Thank you, Mr. Chairman.

I appreciate very much the opportunity to appear before this subcommittee to discuss a very serious problem with our Federal copyright law.

Shortly after I came to the Senate, a freelance writer from my State, Bern Keating of Greenville, MS, brought to my attention a problem facing all freelance writers, artists, and photographers under the Copyright Act's definition of work made for hire. At that time, Mr. Keating was president of the Travel Journalists Guild and was also a member of the Authors Guild, the American Society of Journalists and Authors, the Society of American Travel Writers, and the Overseas Press Guild.

It became clear to me that Mr. Keating's views reflected a genuine and widespread concern of writers, artists, and photographers that the work made for hire provisions of the copyright law were not operating as they were originally intended, and should be amended.

When the current copyright law was passed in 1976, the Congress tried to strike the proper balance between providing incentives to artists and other creators to produce their works, and protecting the interests of disseminators of those works. Unfortunately the proper balance has not been achieved and the root cause of the problem has been the application of the work made for hire doctrine.

The basic premise of the copyright law is that the creator of a work of art is the owner of the copyright in that work. If the creator decides to part with his right, to sell it or give it away, of course, he may do so. But the copyright remains the property right of the creator in the absence of such an act.

Work made for hire was intended to be a narrow exception to this basic rule. As defined in the 1976 act, the author and owner of all copyright rights in a work made for hire is not the creator but is the employer—or, in some cases, the party who commissions the freelance artist to do the work. This presumption was made applicable only to certain specifically described situations in the definition of work made for hire. It applies when an employee produces a work entitled to copyright protection within the scope of his employment. And it applies to certain enumerated types of commissioned works where the creator confirms his agreement in writing.

Despite its intended limited applicability, work made for hire has become a pervasive and destructive practice in many creative fields, especially in the areas of photography and graphic art produced for publishers. Work made for hire has disrupted the delicate balance between the rights of creators and those who commission and distribute their works.

Freelance artists, writers, and photographers are often presented with overreaching work made for hire contracts in situations that

are contrary to the intent of the Copyright Act. Because they do not acquire the status of an employee under such contracts, they receive none of the benefits that employees normally receive as compensation for surrendering copyright ownership to the publisher. Very often publishers demand that work for hire contracts be signed with no opportunity to the creator for meaningful negotiation.

It is very difficult for freelance creators to survive in this atmosphere. It is a situation that does not encourage creativity and productivity.

Since 1982, I have urged passage of legislation in the Senate to clarify the copyright law to ensure that one who actually creates a work of art be considered its author and able to claim the benefits of copyright protection in that work. My bill does not propose a drastic realignment of the relationship between creators and publishers. Instead, it is a corrective measure designed to restore a more appropriate balance to that relationship.

Work made for hire would still be a useful doctrine if my bill were enacted. My bill would assure that work made for hire is confined to the limits that Congress intended when it enacted the 1976 amendments. This must be done to stop the corruption of our copyright system.

Mr. Chairman, I am aware that this subject is a difficult one because it brings under scrutiny fundamental questions of authorship and ownership of copyright. And, there are powerful forces on the other side of the argument. But that is precisely why this subcommittee should address these concerns. Work made for hire strikes at the heart of the relationship between creators and publishers, and it has been abused and now disrupts that relationship to the detriment of the public.

The creative artists of America are being robbed of their incentive to work and their rewards for working. We are all poorer because of it. If we are to have in this Nation a healthy and thriving creative community, these issues can no longer be put aside and left for another day. I urge the subcommittee to act favorably and quickly on S. 1253 and restore the balance in our copyright law.

[The prepared statement of Senator Cochran follows:]

Statement of Senator Thad Cochran

before the

Subcommittee on Patents, Copyrights and Trademarks

September 20, 1989

S. 1253, the Artists' Bill of Rights

Mr. Chairman, I appreciate the opportunity to appear before your Subcommittee to discuss a very serious problem with our federal copyright law.

Shortly after I came to the Senate, a freelance writer from my state, Bern Keating of Greenville, Mississippi, brought to my attention a problem facing all freelance writers, artists and photographers under the Copyright Act's definition of "work made for hire." At that time, Mr. Keating was president of the Travel Journalists Guild, and was also a member of the Authors Guild, the American Society of Journalists and Authors, the Society of American Travel Writers, and the Overseas Press Guild.

It became clear to me that Mr. Keating's views reflected a genuine and widespread concern of writers, artists and photographers that the work made for hire provisions of the copyright law were not operating as they were originally intended, and should be amended.

When the current copyright law was enacted in 1976, the Congress tried to strike the proper balance between providing incentives to artists and other creators to produce their work, and protecting the interests of disseminators of those works. Unfortunately, the proper balance has not been

achieved and the root cause of the problem has been the application of the work made for hire doctrine.

The basic premise of the copyright law is that the creator of a work of art is the owner of the copyright in that work. If the creator decides to part with this right, to sell it or give it away, he may do so, but the copyright remains the property right of the creator in absence of such act.

Work made for hire was intended to be a narrow exception to this basic rule. As defined in the 1976 Act, the "author" and owner of all copyright rights in a work made for hire is not the creator, but is the employer or in some cases the party that commissions the freelance artist to do the work. This presumption was made applicable to only certain specifically described situations in the definition of "work made for hire." It applies when an employee produces a work entitled to copyright protection within the scope of his employment. And it applies to certain enumerated types of commissioned works where the creator confirms his agreement in writing.

Despite its intended limited applicability, work made for hire has become a pervasive and destructive practice in many creative fields, especially in the areas of photography and graphic art produced for publishers. Work made for hire

has disrupted the delicate balance between the rights of creators and those who commission and distribute their works.

Freelance artists, writers and photographers are often presented with overreaching work made for hire contracts in situations that are contrary to the intent of the Copyright Act. Because they do not acquire the status of an employee under such contracts, they receive none of the benefits that employees normally receive as compensation for surrendering copyright ownership to the publisher. Very often publishers demand that work for hire contracts be signed with no opportunity for the creator to engage in meaningful negotiation.

It is very difficult for freelance creators to survive in this atmosphere. It is a situation that does not encourage creativity and productivity.

Since 1982, I have urged passage of legislation in the Senate to clarify the copyright law to ensure that one who actually creates a work of art be considered its author and able to claim the benefits of copyright protection in that work. My bill does not propose a drastic realignment of the relationship between the rights of creators and publishers. Instead, it is a corrective measure designed to restore a more appropriate balance to that relationship.

Work made for hire would still be a useful doctrine if my bill were enacted. My bill would assure that work made for hire is confined to the limits that Congress intended when it enacted the 1976 amendments. This must be done to stop the corruption of our copyright system.

Mr. Chairman, I am aware that this subject is a difficult one because it brings under scrutiny fundamental questions of authorship and ownership of copyright. And, there are powerful forces on the other side of the argument. But that is precisely why this Subcommittee should address these concerns. Work made for hire strikes at the heart of the relationship between creators and publishers, and it has been abused and now disrupts that relationship to the detriment of the public. The creative artists of America are being robbed of their incentive to work and their rewards for working. We are all poorer because of it.

If we are to have in this nation a healthy and thriving creative community, these issues can no longer be put aside and left for another day.

I urge this Subcommittee to act favorably and quickly on S. 1253 and restore the balance in our copyright law.

Senator DECONCINI. Thank you, Senator Cochran. I appreciate your statement, and this committee intends to move on your bill and make some decisions this session if we possibly can. You raise a very cogent issue and I can assure you of the careful attention of this subcommittee.

I have no questions for the Senator from Mississippi.

Senator Hatch.

Senator HATCH. I have no questions either.

Thanks, Thad. We appreciate having your testimony.

Senator COCHRAN. Thank you very much for allowing me to appear.

Senator DECONCINI. Our next witness will be Mr. Ralph Oman, Register of Copyrights. Please come forward. Dorothy Schrader will be with him.

Mr. OMAN. And with your permission, Mr. Chairman, Mr. William Patry, a policy and planning advisor.

Senator DECONCINI. Please proceed. If you would summarize your testimony, Mr. Oman.

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS, WASHINGTON, DC, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL, AND WILLIAM PATRY, POLICY PLANNING ADVISOR TO REGISTER OF COPYRIGHTS

Mr. OMAN. Thank you very much, Mr. Chairman. I have prepared a written statement and I would submit that for the record, with your permission.

Senator DECONCINI. Without objection

Mr. OMAN. Let me summarize that statement.

Senator Cochran's bill seeks to change the provisions of the Copyright Act concerning work made for hire and joint works by amending the definitions of these terms in section 101 of the Copyright Act. Unlike previous efforts, S. 1253 does not seek to reorder the marketplace in any major way; it only tries to clarify the existing provisions.

As Senator Cochran just noted, the first great rule of copyright law is that the man or woman who creates a copyrighted work is the copyright owner. The work made for hire doctrine represents a departure from this general rule.

In the two circumstances, the law treats the person or company who hires the real author as the legal author and copyright owner, first, where the work is created by an employee within the scope of his or her employment, and in the case of commissioned works where the work falls within one of nine special categories and the parties sign a document agreeing that the work is made for hire. Otherwise, a commissioned work can never be a work for hire.

In June, of course, as we have learned, the Supreme Court in a unanimous decision for the first time interpreted the "work made for hire" provisions of the 1976 act in CCNV versus Reid. As you know, Mr. Chairman, Mitch Snyder's group commissioned a Baltimore sculptor to create a statue of a homeless family. The Court said that since the work didn't fit into one of the nine enumerated categories, it could not be a commissioned work for hire under the second circumstance.

The Court also said that we should define "employee" in the first circumstance, with reference to agency law, looking at factors like actual control. With this definition they found that Mr. Reid did not qualify as an employee.

The question naturally arises, Mr. Chairman, as to why we need legislation after the Supreme Court's authoritative ruling. I see two reasons why Congress should act.

First, the Court's decision on the agency question rested on an absence of Congressional guidance on the definition of employee, guidance that Congress can now provide.

Second, as a matter of policy, the Court by adopting an agency standard for work made for hire raises some real problems. It introduces uncertainty into the business relationship by setting out 11 different interrelated criteria that should be examined. That is quite a burden on transactions in copyrighted works.

The agency approach also makes many ownership determinations ad hoc and post hoc because we cannot evaluate many of the criteria until after the work is completed.

So the Cochran bill defines employee as "formal, salaried employee," which greatly reduces the possibility of confusion and uncertainty. Unless the real author or artist is actually on your staff, or unless the work falls into one of the nine categories of commissioned works, you cannot own the copyright as the author of a work made for hire.

Of course, the freelance author can then assign all rights of exploitation to the person who pays for the work, but the author would then recapture those rights after 35 years under the termination clause. In most cases the work has no commercial value after 35 years, so this termination of the assignment has no economic significance, but in some rare cases it may have value, and this troubles some of the publishers. If they had to renegotiate a fresh assignment for a work of enduring value, the bargaining power of the author could allow some polite extortion.

With regard to commissioned works, the Cochran bill also makes explicit that the parties must sign the written agreement before the author begins work. It doesn't make good business sense to wait until after the work is created to begin bargaining over ownership. A carpenter who is about to build a house would not want to start negotiating with the owners of a piece of property over the price of the house after he had completed the house on their property. The negotiation should take place before the work is done, when the bargaining power of both parties is the greatest, so Congress should require a written agreement for all nine categories of commissioned works before the artist starts working. This approach is fair to both sides.

The second major area addressed by S. 1253, Mr. Chairman, is that of joint authorship. In CCNV, the court of appeals remanded this issue back to the district court, and the Supreme Court left it undecided.

Under the current joint authorship doctrine, when two authors intend to merge their individual contributions into a single, unitary whole, like the words and music of a song, each author owns an undivided one-half interest in the work and can market the

work without the other author's permission. All they have to do is account for profits to the joint author.

The circuit court opinion in CCNV hinted that a so-called joint author may not need to contribute what they called copyrightable authorship in order to be considered a joint author. This reasoning is wrong as a matter of both statutory construction and policy. Applying this theory, unscrupulous people could take advantage of freelancers by forcing them to agree to a phony joint authorship arrangement. Congress opposed this potential exploitation back in 1976, and Congress should oppose this reading of the law today.

Mr. Chairman, the court of appeals in CCNV recognized that a more restrictive definition of work made for hire might just shift the battle over work made for hire from that arena into the joint works arena. Congress should treat work made for hire and joint authorship as a package and lay all of these issues to rest once and for all.

S. 1253 offers a fair, comprehensive solution. While I see some areas for improvement, I support it. It will not help one side or the other so much as encourage the creation of new works, which is the underlying purpose of the copyright clause of the Constitution. At bottom, Mr. Chairman, the public will benefit.

That concludes my oral presentation, Mr. Chairman. I would be pleased to answer any questions.

Senator DECONCINI. Thank you, Mr. Oman. I will submit some questions due to time here.

[The prepared statement of Mr. Oman and responses to additional questions follow:]

STATEMENT OF RALPH OMAN
REGISTER OF COPYRIGHTS AND
ASSISTANT LIBRARIAN FOR COPYRIGHT SERVICES

Before the Subcommittee on Patents, Copyrights
and Trademarks
Senate Committee on the Judiciary
101st Congress, First Session
September 20, 1989

Mr. Chairman and members of the Subcommittee, I am Ralph Oman, Register of Copyrights in the Copyright Office of the Library of Congress and Assistant Librarian for Copyright Services. I thank you and the Subcommittee staff for giving me the opportunity to testify today on S.1253, a bill to amend the Copyright Act with respect to works-made-for-hire and works of joint authorship.

A. BACKGROUND

Under the Copyright Act of 1976, the copyright in a work vests initially in the author or authors of the work. 17 USC 201(a). In the case of so-called "works made for hire," "the employer or other person for whom the work was prepared is considered the author" and, "unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." 17 USC 201(b).

Section 101 of the Act defines two categories of works that may, under specified conditions, constitute "works made for hire." One category, defined

in subdivision (1), includes works "prepared by an employee within the scope of his or her employment." The Copyright Act does not, however, contain definitions of the terms "employee" or "scope of employment." The other category, defined in subdivision (2), includes works "specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

The purpose of the work-made-for-hire provisions is to protect the rights of individual authors while still providing employers and those commissioning works a mechanism by which to secure the usage rights that their financial and editorial support warrant. [1] The Act accomplishes this purpose by providing, on the one hand, that in the case of works created by employees within the scope of their employment, their employer automatically owns all rights in the work, and, on the other hand, that the types of specially ordered or commissioned works-made-for-hire are limited to those falling within one of the nine enumerated categories of works in subdivision (2), and by further conditioning work-made-for-hire status for works falling within

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1. Section 201(d) permits transfer of all or part of a copyright "by any means of conveyance or by operation of law." Thus, even if an employer or commissioning party cannot obtain rights to a particular work through work-made-for-hire status, all or selected rights may be obtained, on an exclusive or nonexclusive basis, through negotiation with the author. Although nonexclusive licenses may be oral, exclusive licenses and transfers of all rights (other than by operation of law), must be in writing. 17 USC (204(a).

one of those categories upon the parties signing an agreement designating the work as one made for hire. The two work-made-for-hire categories represent a carefully worked out compromise between the interested parties, negotiated by the Copyright Office, and endorsed by Congress.

On June 5, 1989, the Supreme Court interpreted the work-made-for-hire provisions in Community for Creative Non-Violence v. Reid, 109 S.Ct. 2166 (1989). The Copyright Office, through the Solicitor General, submitted an amicus curiae brief to the Court, arguing: (1) the term "employee" in the first subdivision is limited to formal, salaried employees; and, (2) the two subdivisions are mutually exclusive; i.e., independent contractors whose works do not qualify under the terms of the second subdivision may not be regarded as employees under the first subdivision. The Court did not adopt the Copyright Office's interpretation of the first subdivision, deciding instead that Congress intended to use federal common law rules of agency to construe the term "employee;" the Court did, however, state that the two subdivisions are mutually exclusive.

The Supreme Court's construction of the term "employee" rested on the absence of a definition of the term in the Copyright Act of 1976 and the Court's practice of "infer[ring], unless the statute otherwise dictates, that Congress means to incorporate the established meaning of ... terms. In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine." 109 S.Ct. at 2172.

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Legislation altering the Court's interpretation of the statute is desirable. Since the Supreme Court's agency law approach is dependent upon the balancing of a large number of factors, no one of which is determinative, ownership questions will, of necessity, be ad (and post) hoc. I am doubtful that the agency law approach will provide certainty in business relations. Litigation, involving facts years old and inevitably shoehorned by the parties to conform with the factors set forth in CCNV, could, without clarifying legislation, be the ultimate legacy of the CCNV decision. I believe the approach taken by S. 1253 represents, on balance, a sound approach to ownership issues and will provide order and certainty in business relations.

S.1253 also addresses a number of important issues related to work-made-for-hire not decided by the Supreme Court; e.g., blanket and ex post facto work-made-for-hire agreements. For the reasons given below, the approach taken by S.1253 represents, on balance, a sound approach to these issues.

Finally, S. 1253 would amend the current definition of a "joint work" in two respects; first, by including a requirement that each joint author make an "original" contribution to the work, and, second, by requiring that in the case of specially ordered or commissioned works only, there must be a signed written agreement, entered into before commencement of the work, that the work shall be considered a joint work.

The current definition of a "joint work" states that a joint work is a work "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 USC 101. The Senate Judiciary Committee report accompanying the

1976 Act indicates that the "touchstone" of joint authorship is the parties' intention, at the time the work is created, "that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either 'inseparable' (as in the case of a novel or painting) or 'interdependent' (as in the case of a motion picture, opera, or the words and music of a song)." S. Rep. No. 94-473, 94th Cong., 1st Sess. 103-104 (1975). See also: H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 120 (1976). The purpose of this definition was to cut back on expansive decisions by the Second Circuit under the 1909 Act, holding that complementary efforts performed at different times by authors unacquainted with one another resulted in a work of joint authorship because there was a common design. [2]

The purpose of S.1253's proposed amendments is, first, (contrary to the suggestion of the District of Columbia Circuit in dictum in Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1496 n.15 (D.C. Cir. 1988), aff'd on other grounds, 109 S.Ct. 2166 (1989)), to make clear that each joint author's contribution must consist of copyrightable material. The D.C. Circuit expressed the possibility that the mere supplying of titles or other uncopyrightable elements might be sufficient to render one a joint author. Such a result would violate the statute. The 1976 Copyright Act extends copyright to "original works of authorship." One who contributes only uncopyrightable elements cannot be considered an author nor can such elements

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2. Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1946), cert. denied, 331 U.S. 820 (1947)("Melancholy Baby" held to be a joint work even though lyrics were substituted for those written earlier in collaboration with the composer); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 221 F.2d 569, modified on rehearing, 223 F.2d 252 (2d Cir. 1955)("Twelfth Street Rag").

be deemed original works of authorship. I therefore welcome S.1253's clarification that a joint author must still be an author.

While sympathetic with S.1253's addition of a writing requirement for specified types of works -- specially ordered or commissioned ones -- in order for the work to be considered a joint work, I cannot support the proposed amendment as currently drafted because it will not work as a practical matter: a work that would be a work of joint authorship but for the failure of a written agreement would nevertheless have to be construed by the courts as being some kind of work for purposes of determining and allocating rights, and I am simply unable to conceive of how the courts would be able to do this under S. 1253.

B. STATUTORY PROVISIONS RELATED TO WORK-MADE-FOR-HIRE AND JOINT AUTHORSHIP

1. Work Made for Hire

The work-made-for-hire provisions of the 1976 Act were formulated between 1961 and 1966, in an extensive revision process in which the Copyright Office took a lead role, and in which various affected interests expressed their particular views. At the time the work-made-for-hire revisions were being considered, the then existing work-made-for-hire provision, Section 26 of the 1909 Copyright Act, provided simply that "the word 'author' shall include an employer in the case of works made for hire." Although the statute did not define "employer" or "work made for hire," the pre-1966 case law under Section 26 had applied the work-made-for-hire doctrine solely in cases involving regular, salaried employees. The doctrine had not been applied to commissioned works; instead, the courts developed a common law presumption

that a commissioned party impliedly agreed to convey the copyright, along with the material embodiment of the work, to the hiring party. [3]

This was the legal context -- where work-made-for-hire status was conferred only on works created by regular, salaried employees -- in which the revision of the work-made-for-hire definition took place. Not surprisingly, therefore, the Copyright Office, in its initial legislative proposal, recommended that no commissioned works be included within the ambit of the proposed made-for-hire provisions. [4] This proposal met with resistance from book publishers and motion picture companies. Subsequent meetings among representatives of the Copyright Office, book publishers, motion picture companies, and authors resulted in a compromise, which was then presented to Congress and incorporated in the 1965 revision bill. [5] This bill defined "work made for hire" in the same form, and nearly the same terms, as the bill that Congress would ultimately approve 11 years later, in the Copyright Act of 1976. The only difference between the 1965 revision bill and the 1976 Act on this point is expansion of categories of potential commissioned works-made-for-hire from four in the 1965 bill to nine in the 1976 Act.

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3. See, e.g., Yardley v. Houghton Mifflin Co., 108 F.2d 28 (1939), cert. denied, 309 U.S. 686 (1940).

4. See Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. 86 (Comm. Print 1961); Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, at 15 n.11 (1964).

5. See Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 1965 Revision Bill, 89th Cong., 1st Sess. 67 (1965); Copyright Law Revision: Hearings on H.R. 4347 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 134 (1965).

In 1966, after the compromise on work-made-for-hire had been worked out and included in the revision legislation, the Second Circuit, in a line of cases beginning with Brattleboro Pub. Corp. v. Winmill Pub. Corp., 369 F.2d 565 (2d Cir. 1966), for the first time brought commissioned works within the ambit of the term "employer" under the 1909 Act work-made-for-hire doctrine. No reference to this new line of cases was made in subsequent legislative reports, nor were the revision legislation's provisions on work made for hire amended. The lack of a definition of "employee" and the lack of reference to the Brattleboro line of cases in the legislative history accounts for the subsequent confusion in the courts in construing the work-made-for-hire provisions in the 1976 Copyright Act.

2. Joint Authorship

The 1909 Act did not contain provisions on joint authorship, leaving the matter up to the courts. Decisions of the Second Circuit, construing the term generously, [6] were subject to widespread criticism. Thus, unlike work-made-for-hire, there was little dissension regarding the revision effort to define the term along the lines adopted in the 1976 Act, and it is clear that Congress intended to modify the case law regarding joint works.

C. JUDICIAL INTERPRETATIONS OF WORK MADE FOR HIRE

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6. Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1946), cert. denied, 331 U.S. 820 (1947)("Melancholy Baby" held to be joint work even though lyrics were substituted for those written earlier in collaboration with the composer); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 221 F.2d 569, modified on rehearing, 223 F.2d 252 (2d Cir. 1955)("Twelfth Street Rag").

AND JOINT AUTHORSHIP

1. Work Made for Hire

a. The Actual Supervision and Control Line of Cases

Immediately following passage of the 1976 Act, the district courts interpreted the work-made-for-hire provisions in accordance with the approach taken by S.1253. [7] In 1984, however, the Second Circuit, in Aldon Accessories, Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir.), cert. denied, 469 U.S. 982 (1984), concluded that Congress intended to alter the decisional law under the 1909 Act, but only to the extent of correcting "those situations where the contracting party did all of the creative work and the hiring party did little or nothing." 738 F.2d at 552. According to the Aldon court, prior case law categorizing as "employees" those whose work is subject to "actual supervision and control" by the hiring party was retained in the 1976 Act. Id.

There are a number of problems with the Aldon test. These include: (1) the issue is usually raised, as in Aldon, not in the course of a dispute between the hiring party and the hired party, but by a third party defendant claiming the hiring party does not have standing to sue; in order to overcome this argument, courts are led to vest all rights in the hiring party, thereby depriving the creator of his or her rights; (2) the outcome of ownership of copyright is very fact-specific, frequently post hoc (the time when all the facts surrounding each party's contributions can be finally known), and thus does not provide certainty for buyers or sellers; (3) there is difficulty preventing the test from degenerating into the more liberal "right to

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7. See, e.g., Aitken, Hazen, Hoffman & Miller, P.C. v. Empire Construction Co., 542 F. Supp. 252 (D. Neb. 1982); Childers v. High Society Magazine, 557 F. Supp. 978 (SDNY 1983).

supervise and control" test; and, (4), as noted by the Fifth Circuit, "[t]here is simply no way to milk the 'actual control' test of Aldon from the language of the statute." [8] The actual supervision and control test does, however, appeal to those who believe as a matter of policy that a hiring party who supervises the creation of a work should own all rights in the work. Additionally, some believe hiring parties are generally better able to exploit a work, and thus that the public will benefit (by greater dissemination) from vesting rights in the hiring party.

b. The Agency Law Line of Cases

Because of perceived shortcomings in the actual supervision and control test, the Fifth and District of Columbia Circuits endorsed an agency law approach based on Section 220 of the Restatement of Agency. See Easter Seal Society v. Playboy Enterprises, 815 F.2d 323 (5th Cir. 1987), cert. denied, 108 S.Ct. 1280 (1988); Community for Creative Non-Violence v. Reid, 846 F.2d 1485 (D.C. Cir. 1988), aff'd, 109 S. Ct. 2166 (1989). Under this approach, "a work is 'made for hire'... if and only if the seller is an employee within the meaning of agency law, or the buyer and seller comply with the requirements of Sec. 101(2)." Easter Seal, supra, 815 F.2d at 334-335. Thus, subdivision 1 applies whenever the creator of the work is an employee, under agency law principles. Subdivision 2 applies if the creator of the work is not an employee under agency law and if the requirements of that subdivision are satisfied (the work falls into one of the nine enumerated categories of subject matter, and there is a written agreement signed by the parties specifying that the work is made for hire).

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8. Easter Seal Society v. Playboy Enterprises, 815 F.2d 323, 334 (5th Cir. 1987), cert. denied, 108 S.Ct. 1280 (1988).

In adopting an agency law approach to determining who an "employee" is, the Fifth Circuit recognized that there is no general federal agency law, and that adopting state agency law would be contrary to an important goal of the Copyright Act: national uniformity. 815 F.2d at 335. To remedy this defect, the court of appeals indicated that the lower courts could turn to the pre-1966 line of copyright cases and to the general principles set forth in the Restatement of Agency [9]. Id.

As with the actual supervision and control test, there are a number of problems with the agency law approach, not the least of which is that, upon analysis, the agency approach differs little in practical effect from the actual supervision and control test. This is the case because an important element, indeed the first one listed in the Restatement, is of supervision and control. [10] In fact, an argument can be made that, in the application of this factor, the agency law approach is even more injurious to creators: under Aldon, the court examines each work to see if sufficient actual supervision and control was exercised; it is possible that one work may satisfy the test, while a second, later work might not. Under the agency law approach, however, once an agency relationship has been proven, all works created within that relationship are deemed to be work-made-for-hire, regardless of the degree of

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9. The Restatement factors are set forth by the court in the margin of its opinion. See 815 F.2d at 335 n.20.

10. See Dumas v. Gommerman, 865 F.2d 1093, 1104 (9th Cir. 1989)("the Fifth Circuit indirectly includes the rejected 'supervision and control' test, because agency law considers relevant 'the extent of control which, by the agreement, the master may exercise over the details of the work.' Restatement (Second) of Agency Sec. 220(2)(a)").

actual supervision and control exercised over particular works. Two other problems may be noted: (1) as recognized by the Fifth Circuit, there is no general federal law of agency, hence uniform national application of the law will prove difficult, an undesirable result given the importance of ownership and the wide distribution of copyrighted materials; (2) as with the actual supervision and control test, determinations of agency status will be ad and post hoc since one may well have to await completion of the work before it is known how to fit the facts into the factors.

On the other hand, the agency approach does provide flexibility to the courts in dealing with situations outside of the formal salaried environment, for example those involving volunteers and individuals compensated by nonsalaried means. Courts can meld ownership to fit the particular facts and equities at hand.

c. Dumas v. Gommerman and the Formal Salaried Employee Approach

On January 13, 1989, the Ninth Circuit, in Dumas v. Gommerman, 865 F.2d 1093 (9th Cir. 1989), adopted the formal salaried approach to determining "employee" under the first subdivision. This position was based on an extensive review of the legislative history of the work-made-for-hire provisions, analysis of perceived shortcomings of the other circuits' approaches, and a view that "[b]y defining 'employee' to cover only formal, salaried employees, few disputes should arise as to the status of the artist." 865 F.2d at 1105. I agree with this view, a conclusion that forms the basis for my support of S.1253.

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One argument against the formal salaried approach to defining "employee" adopted in Dumas is that it does not encompass situations outside the mainstream, e.g., volunteers and those with nonsalaried compensation arrangements. It is precisely in these areas that the agency approach provides flexibility. [11] The presence of ambiguities in the statute has traditionally worked to the detriment of creators, and, thus, such ambiguous situations should be avoided wherever possible. Hiring parties who fail to meet the work-made-for-hire standards can, nevertheless, enter into negotiations with the artist to obtain, by transfer, those rights desired beyond the implied right to exploit the work that arises from the commissioning and payment of the work. [12]

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11. For example, a regular volunteer at a local church, within the work normally performed by him or her for the church, produces reports, drawings, or musical compositions. The volunteer creates the works on church premises, uses church materials, and is supervised by church officials. The agency law approach may well deem such an individual an "employee." Other examples would include work done for health clinics or agencies like the Red Cross.

Volunteers would, however, be excluded under the formal salaried approach. Although it might be possible to engraft them on to the statute, such an effort would, I believe, destroy the integrity of the formal salaried approach, leading to problems in other areas. The number of disputes involving volunteers should be minimal, in any event, since the charitable agency would have an implied right to use the work for the purpose for which it was created; it is only when the agency (or the volunteer) uses the work beyond that purpose that disputes will arise. Under such circumstances, I believe the parties should negotiate over the desired rights, but that failing agreement, ownership should vest in the volunteer.

12. The Copyright Act gives owners of the physical embodiment of the work certain rights to use the work without the permission of the copyright owner. For example, regardless of ownership of the copyright, a party who commissions a work of sculpture has the right, under Section 109(c) to publicly display the sculpture.

I recognize that difficulties may arise in determining what a "formal salaried" employee is [13], but I also think that most of the ambiguities can be cleared up in the legislative history, or by amending the term to better reflect the intent of limiting subdivision (1) to regular employment situations, e.g., those involving an ongoing, permanent employment relationship in which the employee receives a steady, usually fixed, compensation [14] and benefits. Such drafting difficulties should not, however, be allowed to serve as a convenient cover for opposition to the principle.

d. The Supreme Court decision in CCNV v. Reid

On June 5, 1989, the Supreme Court affirmed the District of Columbia Court of Appeals' decision in Community for Creative Non-Violence v. Reid, adopting the agency law approach to determining who an "employee" is within the meaning of the first subdivision. The Court's opinion contains the following discussion on the appropriate factors to look at in determining agency status:

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[13]. The word "formal" may be read as drawing a distinction between "informal" salaried employees, leading to the question what difference there is between the two categories. One example would be an individual who is hired full time for a specific, lengthy project and paid a set fee. After completion of the project, the individual goes and works for another company, and then another, and so on. The individual may work primarily out of the office with a minimum of supervision, but be classified as an "employee" for tax or other reasons. Such a person would probably not be considered an "formal salaried" employee under S. 1253, but may be considered an "informal" employee. The critical fact is an ongoing, permanent relationship.

[14]. For example, compensation by commission or piece work rate should also be consider "salaried" employment.

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> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. (citation omitted). No one of these factors is determinative.
> 109 S. Ct. at 2178-2179.

While some of these factors will be known in advance, others will not, including the amount of supervision and control exercised by the hiring party over the work's creation. [15] Thus, determination of ownership may have to be evaluated after the fact, and, no doubt, would be subject to dispute between the parties. The uncertainty of application and tendency to promote rather than diminish the number of disputes is reason enough to jettison the Supreme Court's approach. S. 1253 will provide for certainty of application before the work is created, and will, thereby, reduce the number of disputes over ownership. Thus, despite certain definitional problems, on balance, S. 1253's formal salaried approach represents the best available approach to the problem.

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15. The factor cited by the court actually refers to the right to supervise and control, a right that flows almost automatically from the mere relationship of the parties.

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I am unaware of any decisions in the final two areas regarding work made for hire covered by S.1253: a prohibition on blanket work-made-for-hire agreements and ex post facto work-made-for-hire agreements, such as those accomplished by check endorsements. A strict reading of the Act would seem to bar blanket work-made-for-hire agreements, since the second definition of the term -- that pertaining to specially ordered or commissioned works -- refers to a written instrument signed by the parties that "the work shall be considered a work made for hire." Nevertheless, I am aware that blanket agreements are being used, and in order to prevent such circumvention of the statute, I support S.1253's proposed amendment.

I am also aware of the assertion that such agreements are necessary in certain industries because there frequently is not time to get a signed agreement, and in other industries because of the large number of contributors, e.g., textbooks. The newspaper industry's use of "stringers" is one example frequently cited for the "time pressure" need for blanket work-made-for-hire agreements. There are two possible resolutions to this problem. First, at the time of the stringer's original employment, the parties can agree that the stringer will execute all documents necessary for the newspaper to secure the desired rights. [16] A later agreement, executed after creation of the work transferring rights to the newspaper will be valid. Second, a written agreement (even by telex) to enter into a work-made-for-hire agreement can be subsequently ratified by the work-made-for-hire agreement itself.

The first solution does not vest work made-for-hire status on the hiring party, but it does vest all (or whatever) rights negotiated by the parties.

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16. A number of such agreements currently in use grant the publisher or hiring party a power of attorney to execute those documents if the creator refuses or fails to do so.

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One argument against this approach is that it subjects the hiring party to a 35-year termination of rights under 17 USC Sec. 203. [17] I question, however, the need for work-made-for-hire agreements in most of the "emergency" circumstances typically cited. The very short commercial life of the material would be more than protected by a simple transfer of rights for the desired period.

Regarding the need for blanket agreements due to a large number of contributors or situations where it is not always clear what "work" the commissioned party's contribution will appear in, the dispute seems to reduce itself to a complaint about increased paperwork. This is not to say that an increase in such work is a factor not to be considered; it is only to say that when we weigh such considerations against a creator's constitutional stake in ownership of his or her own work, the scales tip in favor of the creator.

Finally, questions have been raised about when "commencement" of the work begins: when ideas or drafts are submitted; when a nonsubstantial amount of actual effort on creating expression has taken place; or only when a substantial amount of expression has been created? I understand that it is not uncommon for independent contractors to take rough sketches of works to publishers or other hiring parties, for the two parties to then jointly discuss and agree on changes in the work, and to then have the independent

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17. A second argument sometimes advanced is that authorship status is needed by the hiring party for enforcement of rights in foreign countries, particularly those with a high level of moral rights. Yet, it would appear that in most of the economically significant circumstances under which such difficulties might arise, e.g., motion pictures, the existing work-made-for-hire provisions and standard contractual clauses are well able to handle the matter.

contractor resubmit the work for approval to proceed. The argument goes that a requirement of a writing "before commencement" of such a work would render a work-made-for-hire agreement entered into at the "approval" stage of the above cited facts invalid. Obviously, one needs many more facts to make an informed judgment, but, as a theoretical matter, I do not see why as a matter of law such an agreement would be invalid. Indeed, if we think things through in practical terms, we are dealing only with situations where the parties have executed a work-made-for-hire agreement, presumably the commissioned party becomes dissatisfied, and sues the hiring party to overturn the agreement. One can speculate that the facts would have to be fairly egregious before a court would invalidate the agreement, and, perhaps, under such circumstances a court should be able to do so. In any event, the remoteness of such disputes and the well-established distinction in the case law between contributions of ideas and contributions of expression leads me to conclude, at this time, that the "before commencement" problem is not a severe one.

One alternative to the "before commencement" language would be to require a written agreement "before completion of a substantial portion of the work." Of course, one then will have disputes over what a "substantial portion" means. Nonetheless, such a provision may be less objectionable to publishers and other hiring parties.

You will hear from representatives of the publishing industry on these issues, and I am sure they will effectively present their objections. It may be that further accommodations to their concerns can be made, but based on the present evidence, there are adequate existing mechanisms that enable publishers and other hiring parties to obtain all rights they reasonably need to exploit works of authorship.

2. Joint Authorship

Early decisions under the 1976 Act correctly emphasized that a putative joint author must make a genuine copyrightable contribution to the work. This principle was applied in cases involving architectural works, [18] computer programs, [19] and fabric designs. [20] As one court noted: "To be a joint author, a person's contribution must be ... one of authorship." [21]

In CCNV v. Reid, the District of Columbia Court of Appeals questioned this well-established principle, rooted in the constitutional limitation on congressional authority to promulgate legislation to protect the writings of authors. The court indicated that perhaps "the contribution of a joint author need not be copyrightable 'standing alone,'" and thus, the supplying of an uncopyrightable title or legend could count toward meeting the "more than de minimis threshold required for joint authorship." 846 F.2d at 1496 n.15. While there is some uncertainty about the full thrust of this dictum, [22] I conclude

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18. Meltzer v. Zoller, 520 F. Supp. 847 (D.N.J. 1981); Aitken, Hazen, Hoffman & Miller, P.C. v. Empire Construction Co., 542 F. Supp. 252 (D. Neb. 1982).

19. Whelan Associates, Inc. v. Jaslow Dental Lab., 609 F. Supp. 1307 (E.D.Pa. 1985), aff'd, 797 F.2d 1222 (3d Cir. 1986), cert. denied, 107 S.Ct. 877 (1987).

20. Kenbrooke Fabrics Inc. v. Material Things, 223 USPQ 1039 (SDNY 1984). Cf. Mister B Textiles Inc. v. Woodcrest Fabrics, Inc., 523 F. Supp. 21 (SDNY 1981).

21. Dahinden v. Byrne, 220 USPQ 719, 721 (D. Ore.1982).

22. Is the court indicating that a joint author must contribute copyrightable authorship, but that that authorship need not be able to survive as a separately copyrightable work,

that this very uncertainty will likely lead to years of litigation, and, if interpreted to mean that a joint author need not contribute any copyrightable expression, will violate the statute, and arguably the Constitution. S.1253 will prevent such uncertainty and dispute by clarifying that each joint author must contribute "original," that is, copyrightable, material.

S. 1253 also requires that for all [23] specially ordered or commissioned works, the parties must, before commencement of the work, enter into a signed agreement stating that the work is to be one of joint authorship. The purpose of this provision is to prevent after-the-fact claims of joint authorship by hiring parties who fail to qualify as work-made-for-hire employers. While I appreciate the goal of the amendment, I am unsure how it would work in practice. Assume, for example, that the producer of an audiovisual work for elementary schools commissions a friend who is a composer to write some music for the work; the two work closely, with the producer giving detailed comments and suggestions for both the original draft and subsequent revisions of the music (some, but not all, of which the composer takes, since the producer has no right to supervise and control the creation of the music), and the composer giving suggestions for revision of the visual component of the work, (some, but not all, of which the producer takes). The only agreement is an oral one

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or, is the court indicating that one joint author need not contribute copyrightable authorship as long as those contributions represent more than a de minimis amount of uncopyrightable material and as long as the work as a whole is copyrightable, presumably due to the efforts of the other joint author?

23. Consideration was apparently given to limiting this requirement to only the nine categories of specially ordered or commissioned works contained in the second definition of "work made for hire" in Section 101, but as written the bill is not so limited.

to split the profits 75-25%. Under CCNV v. Reid, it is unlikely the music would be deemed made for hire. Under the existing statute, the work would qualify as a joint work. Under S.1253, though, the work could not be a joint work since no written agreement to that effect was entered into. [24] The question then arises, who owns what rights? The audiovisual work here consists of "inseparable or interdependent parts" that are useful only as part of a "unitary whole." The easy answer is to say each owns rights in his or her contribution, but this answer gets you no place where each contribution is only marketed as part of the unitary whole. I do not see how the work could be anything but a joint work, a result prohibited by S.1253.

3. Relationship Between Work Made for Hire and Joint Authorship

Frequently, joint authorship issues are raised as a back-up argument to a claim for work made for hire status. Indeed, some copyright experts think that the Second Circuit, in Aldon Accessories, reached the result it did on work made for hire because it did not want, for practical reasons, to hold that the foreign creators of the work were joint authors along with the U.S. company that commissioned the work. The connection between work made for hire and joint authorship was noted by Judge Ginsburg in CCNV v. Reid, 846 F.2d at 1497 n.17: "With the substantial cutback of the work for hire doctrine under the 1976 Act, more cases ... can be expected to appear under the joint authorship rubric." Of course, Judge Ginsburg's own opinion will contribute

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24. This same result would obtain if the parties became aware of the writing requirement after commencement of the work. Despite their intent, ab initio, that the work be, in fact, a joint work, S.1253 would frustrate this intent.

significantly to an increase in disputes over ownership. It is time to treat work-made-for-hire and joint authorship as a package so that we can finally lay these matters to rest once and for all. S.1253 represents a responsible comprehensive solution, and, while I see areas for improvement, it warrants our support.

Thank you. I will be pleased to answer any questions.

RESPONSES TO SENATOR DECONCINI'S QUESTIONS

RELATING TO THE HEARING ON S. 1253 --

WORK FOR HIRE

September 20, 1989

Question 1:

In the United States, we have generally avoided the enactment of moral rights legislation or similar measures regulating private contractual relationships. Rather, we have favored a policy of free negotiation and contract. Our policies have favored the contractual model because of its flexibility in a variety of situations. Has this model broken down in the case of work for hire? Why can't independent artists and employers simply negotiate to reach the optimum result, rather than having Congress mandate their relationship by legislation? Do the economic relations of the publishing industry require congressional intervention?

Answer:

In an ideal world, all people would govern their relationships through common understandings specifying rights and obligations, and finalize the agreement in writing. There would be little need for lawyers or litigation.

Virtually all "for hire" disputes arise because the parties failed to reach a common understanding between themselves -- they assumed too much. In other words, they acted like people frequently do.

On the "for hire" issue, the copyright law attempts to strike a balance which will reflect the normal expectations of the creative and publishing communities. If an author creates a work within the scope of employment, the copyright law vests the initial copyright in the employer. It is believed that position this best reflects the normal expectations of the parties. If a work is not created within the scope of employment, in general the copyright law vests the copyright in the creator. Again this

position is thought to reflect the normal expectations of the creative and publishing communities.

Parties are free to change the results which would normally flow from application of the copyright law. Employers can assign copyrights to their employee-authors. Commissioning parties can secure copyright through transfer from the creator. In essence, the copyright law governs only where the parties fail to dictate the result through a common written understanding.

As to whether Congress should get involved, the Congress necessarily involves itself when it passes a copyright act setting forth general principles. As long as parties have the right to reach common understandings which dictate outcomes, Congress can not be criticized for unfairly meddling in the affairs of the copyright community. As a matter of policy, Congress may wish to consider the relative bargaining strength of most authors vis-a-vis most producer-publishers. Copyright legislation should set polices that stimulate creativity.

Question 2:

Mr. Oman, in your testimony you've stated that under a strict reading of the present work for hire provisions, blanket agreements would be prohibited because the statute reads "work" rather than "works." Do you have any legislative history or other authority that would support such a strict reading of the statute? Would either independent artists or employers benefit from such a prohibition against agreements covering multiple assignments? What would be the practical effect in the publishing industry of such an interpretation?

Answer:

As I indicated in my written statement, I am aware that blanket work-for-hire agreements are being used. I suggested that such agreements might not be valid under a strict reading of the statute, but no court has ruled on this issue. Nor does the legislative history discuss the point.

Agreements about multiple works are not per se harmful to creators, but, if the works are not specified, blanket agreements may lead to abusive practices. The creator is treated as an employee without obtaining either the other benefits of regular employment or the rights of copyright ownership. S. 1253 would improve the status of creators, and the clarification regarding execution of the work-for-hire agreement before work commences will curtail the potential abuses of blanket agreements.

Question 3:

Mr. Oman, you've referred to the nine enumerated categories that are considered work for hire if designated as such by written agreement. This list was worked out as part of a compromise leading to the current work for hire statute. However, new categories of copyrightable works have come into existence since that compromise. This committee recently heard testimony from a prominent computer lawyer advising that computer software should be added to the list as a tenth category. Would you comment on the advisability of such an addition to the list? Are there other new types of works that should be considered for addition to the list? Are there any types of works now on the list that you would recommend be deleted?

Answer:

As noted above, the current list of works found in subsection (2) of the work made for hire definition was a result of a comprise struck in the mid 1960's, almost ten years before the current Copyright Act was enacted. The categories that made the list were championed by copyright interests at the time who believed that these categories presented special problems not covered by the language of the first part of the work made for hire definition. Thus, a second part was crafted and added to the work made for hire definition to assure that certain types of works would not be statutorily precluded from work made for hire treatment under the copyright laws.

Computer software was clearly not before the drafters of the 1976 Copyright Act since computer software was virtually an unknown quantity at the time the compromise was reached in the mid-1960's. The software industry has blossomed in recent years, however, and the same work made for hire problems that faced the copyright holders and creators of audiovisual works, periodicals, etc., in the 1960's face software producers today.

The Copyright Office is aware that much of the software marketed today comes from those in academia as well as freelance creators. The manufacturers who commission these individuals to create new programs have an interest in assuring that they secure all the rights granted to the copyright holder of such works. This interest is just as viable and as real as the interest of those parties who were fortunate enough to be present when the work for hire compromise of the Copyright Act was reached. The Copyright Office would, therefore, support amendment of subsection (2) of the work made for hire definition to include computer software.

Another category of work that the Office recommends for consideration is sound recordings. Like computer programs, sound recordings are often the result of one or more creators operating under the aegis of a controlling body that seeks to own all the rights to the resulting product. Since sound recordings were not protected under the federal copyright law until 1972, this category was not included in the work made for hire compromise. Producers of sound recordings face circumstances similar to those of computer software and therefore warrant like treatment under the Act's work made for hire provisions.

As to the possibility of deleting categories from subsection (2), the Office would oppose any deletions absent clear and convincing evidence of repeated abuse by copyright holders in any of the nine categories. The current categories were the result of a hard-fought battle between creators and those seeking to obtain the title of statutory author of the work. Those categories are just as viable and as of great a concern to the interested parties today as they were when the Copyright Act was drafted.

Question 4:

Several of our upcoming witnesses refer in their written statements to the impact S. 1253 may have on freedom of speech. It is unclear to me whether the provisions of S. 1253 will impede the free flow of information by imposing additional constraints on employer, or whether it might actually promote speech by protecting the artist. How would you expect these first amendment concerns to play out against one another?

Answer:

It has been argued that the copyright law, in effect, implements the First Amendment. Copyright insures enterprises an economic return on copyright material which is popular and in demand. Without copyright, copyright enterprises would likely go out of business, and First Amendment expression would be reduced to the expressions of the wealthy who could afford to distribute works at a loss.

The "for hire" policy that best implements the First Amendment is the policy that produces the least litigation. If members of the copyright community are spending considerable sums litigating "for hire" issues, these monies can not be used to produce more works.

The "for hire" policy that produces the least litigation is, in my opinion, the policy whose governing principles are easiest to understand. Complexity inevitably leads to misunderstanding and litigation. As long as parties involved in the exploitation of intellectual property understand the governing principles, the proper steps will be taken to insure the necessary rights are secured.

Moreover, the basic purpose of copyright law is to stimulate the creation of new works for the enrichment of society. S. 1253 should tend to encourage authors to create new works, and this diversity carries forward the purposes of the Copyright Clause and the First Amendment.

Question 5:

Mr. Oman, with regard to moral rights provisions generally, the written testimony of one of our upcoming witnesses suggests that the introduction of moral rights into the American copyright system would impair the right of fair use. The fair use provisions of copyright law allow limited taking from a copyrighted work for purposes such as education. Appellate courts have held that fair use is a First Amendment right. However, it has been suggested that taking short quotations or excerpts of an artist's work, as permitted by fair use, would violate the moral rights of integrity and paternity. Would you expect the introduction of moral rights into our system to cripple fair use?

Answer:

In essence, both fair use and moral rights are rules of reason. While the doctrines focus on different issues, it is extremely unlikely that they would ever conflict, except possibly in the case of unpublished works.

The fair use doctrine establishes a rule of reason for third party use. Section 107 of the copyright law carefully delineates the criteria governing fair use. A third party user who clearly falls within the criteria will have such a limited taking that a charge of a moral rights infraction will usually be unsustainable. For example, in connection with the paternity right, what is the value of classroom study of an author who is unidentified?

Moral rights infractions generally involve major takings that threaten the honor or reputation of the author. The limiting takings that are identified in section 107 would not generally meet this threshold. However, if the Congress concludes that there is any doubt on the point, it could clarify that the moral right is subject to the fair use limitation. The visual artists' rights bill, S. 1198, contains such a clarification.

RESPONSES TO SENATOR'S LEAHY'S QUESTIONS

RELATING TO THE HEARING ON S. 1253 --

WORK FOR HIRE

September 20, 1989

Question 1:

Senator Cochran's bill would revise the definition of employees under Section 101(1) of the 1976 Copyright Act so that it reaches only "a formal, salaried employee" and would discard the agency test adopted by the United States Supreme Court in Community for Creative Non-Violence v. Reid. You have testified in favor of the "formal, salaried employee" test established by S. 1253. Why is that standard preferable to the Supreme Court's standard?

Answer:

I favor the formal, salaried employee standard because it is simple, predictable and fair. Moreover, its clarity should discourage litigation, and promote order and certainty in business relations. Since, in this context, the only real difference between authorship and ownership status is the possibility for reclaiming the copyright after 35 years under the termination provisions of the Act, this interpretation does no harm to the commissioning party. A transfer of all rights under the copyright gives an owner sufficient exploitation rights during the ordinary commercial lifespan of copyright works. This legislative solution promises to provide an equitable, common sense clarification in a previously obfuscated area of the law.

Question 2:

S. 1253 also requires that work for hire agreements under Section 101(2) must be signed prior to commencement of the work. How will it be determined when work on a project begins? If a contributor, intrigued by a commissioning party's idea, commences sketches or notes for a project before an agreement is reached, when does the project begin?

Answer:

Certainty in the law will give the parties an opportunity to anticipate this issue. The commissioning party could obtain a preliminary agreement from the contributor which could address whether or not any substantial preliminary work exists. If such work exists, the agreement would assign appropriate rights to the commissioning party. If no preliminary work has been done, the agreement would acknowledge this fact and then make suitable provision to constitute the future work as a work made for hire. As a practical matter, I anticipate few instances when the time work commences will be at issue, once the law is clarified. Since the question would only arise where there is a signed agreement and the creator of the work seeks to defeat the contract, the common assumption would be that the creator became dissatisfied with the agreement after the fact. With ordinary parol evidence rules, and appropriate consideration of who has control of circumstances surrounding commencement of work, the creator would bear a substantial burden of proof to overturn an agreement.

Question 3:

What effect would the requirement that work-for-hire agreements be signed in advance have on time-sensitive industries, such as the news media, that would find it difficult to draw up agreements with one-time contributors during coverage of fast-breaking news stories?

Answer:

General agreements to transfer can always be drawn up in advance, with further provisions specified in supplementary documents. High-tech communication methods such as faxes and telexes belie the conclusion that news organizations would not be able to transmit and receive signed agreements through agents as easily as they can transmit the fast-breaking news stories themselves.

Senator DECONCINI. The original act lists the nine categories. Have you given any thought to a need to expand those categories? We have had testimony here by computer lawyers and others saying that computer software should be added to the list, and that maybe other things should be added to the list. Have you ever given any consideration to that list, in and of itself, in the existing law? Or if we do something with Senator Cochran's list, expanding that list at this time?

Mr. OMAN. Mr. Chairman, we have not formally considered that possibility but we have discussed it informally within the office. Certainly, the copyright laws are always being updated to accommodate new technologies and new forms of expression, and certainly we would want to examine the implications of work made for hire and this provision of the law in regard to those new technologies, particularly in the computer software area.

Senator DECONCINI. Could I ask you to submit to us your analysis of that list and whether or not there should be any additions, or if you have any recommendations?

Mr. OMAN. We'd be happy to do that.

Senator DECONCINI. Thank you. I will submit the balance of my questions. Thank you very much.

Mr. OMAN. Thank you.

Senator DECONCINI. We will now go to the first panel: Mr. Richard Weisgrau, executive director, American Society of Magazine Photographers; Mr. Jay Maisel, a photographer from New York; Mr. Don Martin, a cartoonist, representing the Graphic Artists Guild; and Mr. Tom Clancy, an author.

Gentlemen, we have a busy schedule here. We want to hear from all of you, but we are going to ask that you summarize your statements in about 3 minutes, if you can. Your full statements will be included in the record.

We will start with you, Mr. Weisgrau. Please proceed.

STATEMENT OF RICHARD WEISGRAU, EXECUTIVE DIRECTOR, AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS, NEW YORK, NY

Mr. WEISGRAU. Thank you, Mr. Chairman. My name is Richard Weisgrau and I am the executive director of the American Society of Magazine Photographers, an organization of over 5,000 freelance photographers who produce the best in photography for publishers, advertising agencies, and corporate clients.

The Copyright Justice Coalition, of which ASMP is a part, consists of 50 organizations whose over 100,000 individual members comprise the vast majority of freelance creative talent in the United States. In addition to these remarks, I am submitting detailed documentation on the need for corrective legislation through personal statements drawn from creators' experience and through sample contracts showing the types of abusive practices perpetuated by those who commission freelancers.

Mr. Chairman, I have noticed, in reading the statements of many of the publishing associations, that they seem to be very, very concerned about moral rights. I want to make it clear that we are not here to address moral rights. We are here to speak about the exist-

ing rights under the Copyright Act and what we consider to be reasonable adjustments to the work for hire provision.

We have been seeking changes in work made for hire and those provisions of the copyright law for the past 10 years. The rules governing the right of authorship and ownership of copyright have been twisted beyond recognition by publishers and other users and disseminators of creative works. Twelve years of rather bitter experience with work for hire has proved that it has been extended far beyond the limits that Congress intended and has severely disrupted the delicate balance between the rights of true authors, and publishers who seek to capture the title of author.

Work for hire has been used to deprive creators of their fundamental right to claim authorship of their work and to take away from creators any right to profit from the multiplicity of uses of their creative works. It has been used by those, publishers included, who tried in vain to convince the Supreme Court that freelance creators are the employees of the parties who commissioned them. It has been used to take unconscionable advantage of freelancers by forcing them to sign work for hire agreements stamped as endorsements on the backs of checks which constitute payment. It has been abused by the proliferation of blanket work for hire agreements that take, but do not pay for, all the rights—not only for the work being commissioned, but for all works created in the future by the freelancer.

Some recent blanket work for hire agreements demand a work for hire in both future and past works. After the Reid decision one ASMP member received a letter from Fairchild Publications requesting that "all photographers, as per the copyright law, sign the attached contract to cover all future assignments."

This statement's deception in suggesting that the copyright law requires the agreement to be signed is compounded by the actual language of the agreement: "You hereby agree that all photographs taken by you at any time for Fairchild Publications shall be deemed 'work made for hire.' " This language effectively makes all past and future images taken by the photographer work for hire, all without the payment of any compensation.

Unfortunately, Mr. Chairman, this outrageous expression of a publisher's superior bargaining power is typical of what is happening to creators. Work for hire is abused by those who refuse to negotiate with creators and who blackball those who will not sign. This abuse by those who reap vast profits from the commercial exploitation of the rights of freelancers forces many to live at subsistence levels.

Mr. Chairman, work for hire is at odds with the fundamental purposes of copyright law. Our copyright system is designed to reward creativity and thereby ensure the availability of creative works to the public. Our system seeks to protect the individuals who truly are the lifeblood of America's imagination and innovation from the excesses of those far wealthier entities that, although they claim to create, do not create but simply bring the products of the true creative genius to the public.

I am here today on behalf of freelance creators regardless of whether they use a pen, a brush, or a camera. From the many individual experiences described in the written statements of ASMP

that the CJC uses to illustrate that this is so, let me give one telling example.

[Slide projection.]

Mr. WEISGRAU. These slides represent the brilliant work of an ASMP member, Ellen Schuster, a photographer well known for her multiple exposure surrealistic images. These images have been resold dozens of times, and the copyrights on them are worth many thousands of dollars. Ms. Schuster was commissioned by Time magazine in late 1987 to create a photographic illustration for a cover story on the greenhouse effect. She negotiated a fee of $3,000, commensurate with the value of one-time use for the image on the cover. Time agreed to pay that amount and never mentioned work for hire.

This is the image that Ms. Schuster produced that was ultimately seen by millions of Time subscribers. After it was received by Time, she was sent a work for hire agreement in which, of course, she has no rights. The price paid by Time, of course, bore no relationship to the value of this work over the life of the copyright. After incurring all the expenses necessary to produce the image, and not having received her fee for the time invested in the project, even a photographer of Ms. Schuster's stature had no choice but to sign the work for hire agreement or litigate the issue in court. Since the statute does not clearly bar such after-the-fact agreements, Time succeeded in extracting all the rights from Ms. Schuster, while avoiding paying for them.

Companies like Time—now Time-Warner—have made their intent to deprive creators of their rights abundantly clear. Time's latest annual report states as follows: "In the media and entertainment business of the future, the winners"—those are their words, "the winners"—"will own the copyrights to creative products, as well as the avenues of distribution. We intend to increase our ownership of both." That closes the statement.

That seems to me like a prime ground for creating an information monopoly. That seems to be their intent.

This stance arises from progress in technology that has greatly enhanced the value of copyright rights. Photographic images, for example, can be easily manipulated by computer and adapted for innumerable uses. Whoever owns the copyright will be able to control and profit from these multiple uses. Work for hire has become an epidemic in the creative field and has ironically facilitated its proliferation, to the great detriment of the intended beneficiaries of the copyright laws.

Mr. Chairman, S. 1253 is not a panacea for all of these problems, but it is a necessary and constructive step forward toward the achievement of a fair balance between creators' and publishers' rights. The bill would for the first time establish a clear and objective definition of employee, and I might mention that the Court did not reject "formal salaried employee;" they said there was not enough evidence for them to draw that conclusion.

The bill, in forbidding blanket work for hire agreements, would stop the undermining of and increase the bargaining power of freelance creators. It would forestall the slide toward endless litigation over the meaning of joint work. The bill would establish a clear,

objective standard for determining whether commissioned works qualify as joint works.

Mr. Chairman, the vagueness of the current definition of joint work permits the publisher to argue that their directions or suggestions to creators are sufficient to make the publisher a joint author of the resulting work. The exhibit set up in this hearing room, I think, clearly shows what happens when you give 10 different artists the same assignment. I think it is very, very telling. I know you can't see it from where you sit, but I hope you will have an opportunity to look at it.

If the joint work problem is not addressed, any progress made in the work for hire area will be undermined as publishers claim coauthorship of virtually any creative product in which they have a passing involvement.

We believe that the vesting of the creator's authorship and copyright rights in a publisher through the work for hire agreements is morally offensive and is contrary to one of the fundamental purposes of the copyright law, to foster and encourage creativity. The publishers like to refer to us as contributors. The truth is that we are the authors, and they are the producers and distributors.

While S. 1253 would not bar work for hire agreements, it would at least afford creators a meaningful opportunity to avoid them. S. 1253 would help preserve this Nation's creative resources, and I urge its prompt enactment.

[The prepared statement of Mr. Weisgrau with attachments follow:]

STATEMENT OF RICHARD WEISGRAU ON BEHALF OF THE COPYRIGHT JUSTICE COALITION IN SUPPORT OF S.1253

A Bill to Amend the Copyright Law Regarding Work Made for Hire

Before the Senate Subcommittee on
Patents, Copyrights, and Trademarks

September 20, 1989

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STATEMENT OF RICHARD WEISGRAU,
EXECUTIVE DIRECTOR OF
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ON BEHALF OF THE COPYRIGHT JUSTICE COALITION

Mr. Chairman, my name is Richard Weisgrau, and I am the Executive Director of the American Society of Magazine Photographers. ASMP, as it is known, has over 5000 members, most of whom are freelance photographers who produce some of this country's best photography for publishers, advertising agencies and corporate clients.

The Copyright Justice Coalition, of which ASMP is a part, consists of 50 organizations whose over 100,000 individual members comprise the vast majority of freelance creative talent in the United States.

In addition to my remarks this morning, I am submitting for your consideration a detailed written statement documenting the need for corrective legislation through the personal statements drawn from creators' experiences all over the United States, and through sample contracts showing the type of abusive practices perpetuated by publishers and other entities that commission freelancers.

Mr. Chairman, ASMP has been seeking changes in the "work made for hire" provisions of the copyright laws for the last ten years, and I have been personally involved in that effort throughout that period. We appreciate your willingness to address the most fundamental and vitally important issues in our

copyright system today -- namely, the rules governing the rights of authorship and ownership of copyright.

These rules have been twisted beyond recognition by publishers and other users and disseminators of creative works. Twelve years of bitter experience with work for hire has proved that it has been extended far beyond the limits Congress intended, and has severely disrupted the delicate balance between the rights of true authors and publishers.

Work for hire has been used to deprive creators of their fundamental right to claim authorship of the fruits of their labors. It has been used to take away from creators any right to profit from the multiplicty of uses that can be made of creative images or derivatives of them. It has been used by those, publishers included, who tried in vain to convince the Supreme Court that freelance creators such as James Earl Reid are the "employees" of the parties who commission them -- despite their refusal to pay employment benefits. It has been used to take unconscionable advantage of freelancers by forcing them to sign work for hire agreements stamped on the back of checks. It has been abused by the proliferation of "blanket" work for hire agreements that take -- but do not pay for -- all rights, not only to the work being commissioned, but to <u>all</u> works created in the future by the freelancer.

Some recent "blanket" work for hire agreements attempt to divest creators of all rights in both future and past works. After the Reid decision, one ASMP member received a letter from Fairchild Publications requesting "all Photographers as per Copyright Law to sign the attached contract, to cover all future assignments." Not only was this statement deceptive in suggesting that the copyright law required the agreement to be signed, the language of the agreement in fact went further than the letter indicated. It provided that "you hereby agree that all photographs taken by you at any time for Fairchild Publications shall be deemed works for hire...." (Emphasis added.) This agreement purports to make all past and future images taken by the photographer works for hire -- all without the payment of any compensation. Unfortunately, Mr. Chairman, this egregious abuse of a publisher's superior bargaining power is typical of what is happening to creators on a day-to-day basis.

Work for hire has also been abused by those who refuse to negotiate with creators and seek to blackball those who will not sign their livelihoods away for the payment of a few hundred dollars. And it has been abused by publishers and others who have reaped vast profits from the commercial exploitation of the rights in freelancers' works, but who force them to live at the subsistence level. Some, unfortunately not all, of these abuses would be curbed if S.1253 becomes law.

Mr. Chairman, these consequences are at odds with the fundamental purposes of the copyright laws. Our copyright system is designed to reward creativity and thereby ensure the availability of creative works to the public. Our system seeks to protect the individuals who are the lifeblood of America's imagination and innovation from the excesses of those far wealthier entities that bring the products of that creative genius to the public. I am here today on behalf of all freelance creators, regardless of whether they use a pen, brush or camera, to tell this Subcommittee that work for hire is an unyielding obstacle to the achievement of those basic goals.

From the many individual experiences described in the written statement of ASMP and the CJC that illustrate why this is so, let me give but one telling example. These slides represent the brilliant work of ASMP member Ellen Schuster, a photographer well-known for her multiple exposure surrealistic images. These images have been resold dozens of times and the copyrights in them are worth many thousands of dollars. Ms. Shuster was commissioned by Time Magazine in late 1987 to create a photographic illustration for a cover story on the greenhouse effect. She negotiated a fee, $3,000, commensurate to the value of one-time use of the image on the cover. Time agreed to pay that amount and never mentioned work for hire.

This is the image that Ms. Schuster produced and that was ultimately seen by thousands of Time subscribers. After it was received by Time, she was sent an agreement providing that the image was a work for hire in which she had no rights. The price paid by Time, of course, bore no relationship to the value of this work over the life of the copyright.

After incurring all the expenses necessary to produce the image, and not having received her fee for the time invested in the project, even a photographer of Ms. Schuster's stature had no choice but to sign the work for hire agreement or litigate the issue in court. Since the statute does not clearly bar such after-the-fact agreements, Time succeeded in extracting all rights from Ms. Schuster while avoiding paying for them.

Mr. Chairman, sweeping changes in the marketplace, in industry practices, in the structure of the media and entertainment industries, and in the pace of technological development have raised the stakes of this debate. These changes, coupled with the now-commonplace abusive practices of publishers and others who rely on freelance talent, make the need for corrective legislation far greater today than ever.

First, mergers and acquisitions in the media industry have narrowed the markets for freelancers' services. The companies that remain, like Time-Warner, have made their intent to deprive creators of their rights abundantly clear. Time's latest annual report states as follows:

> In the media and entertainment business of the future, the winners will own the copyrights to creative products, as well as avenues of distribution. We intend to increase our ownership of both.

Second, progress in technology has greatly enhanced the value of copyright rights. Photographic images, for example, can easily be manipulated by computer and adapted for innumerable uses. Whoever owns the copyright will be able to control and to profit from these multiple uses, many of which cannot be anticipated at the time the photographer clicks the shutter.

Third, work for hire has become an epidemic in the creative field. The 1976 Copyright Act, with its express but limited authorization for work for hire agreements, has ironically facilitated their proliferation -- to the great detriment of the intended beneficiaries of the copyright laws.

Mr. Chairman, S.1253 is not a panacea for all of these problems, but it is a necessary and constructive step forward toward the achievement of a fair balance between creators' and publishers' rights. The bill would for the first time establish a clear and objective definition of "employee" that would protect creators and the courts from another decade of litigation in the aftermath of the Reid decision. The bill would forbid after-the-fact and "blanket" work for hire agreements that undermine what little bargaining power freelance creators possess, and would forestall the slide toward endless litigation

over the meaning of "joint work". The bill would establish a clear, objective standard for determining whether commissioned works qualify as joint works.

Mr. Chairman, the vagueness of the current definition of joint work permits publishers to argue that their directions or suggestions to creators are sufficient to make the publisher a joint author of the resulting work. The exhibit set up in the hearing room, which was furnished by the Graphic Artists Guild, shows why that argument lacks any basis in reality. What you see is the tremendous variation and vitality of the creative vision of ten artists, all of whom were given the same assignment. If the joint work problem is not addressed, any progress made in the work for hire area will be undermined as publishers claim coauthorship of virtually any creative product in which they have a passing involvement.

We believe that the vesting of a creator's authorship and copyright rights in a publisher through work for hire agreements is morally offensive and is contrary to one of the fundamental purposes of the copyright laws -- to foster and encourage creativity. While S.1253 would not bar work for hire agreements, it would at least afford creators a meaningful opportunity to avoid them. S.1253 would help preserve this nation's creative resources, and I urge its prompt enactment..

STATEMENT FOR THE RECORD OF RICHARD WEISGRAU ON BEHALF OF THE COPYRIGHT JUSTICE COALITION IN SUPPORT OF S.1253

A Bill to Amend the Copyright Law Regarding Work Made for Hire

Before the Senate Subcommittee on Patents, Copyrights, and Trademarks

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SUMMARY

The "work made for hire" provisions of the 1976 Copyright Act are used to deprive creators throughout the country of their rights of authorship of and copyright in creative works. Although the work for hire provisions were included in the 1976 Act as a means of striking a balance between the rights of creators and the needs of parties that disseminate their works, eleven years of experience under those provisions has shown that they are not working as intended and are fundamentally at odds with the basic purpose of our copyright laws -- to encourage creativity by offering creators the assurance of fair compensation and protection of their works.

Since enactment of the 1976 Act, commissioning parties have consistently and zealously attempted to treat freelance creators as "employees" under the work for hire definition and have engaged in abusive practices with respect to the use of work for hire agreements.

Work for hire agreements are often presented to freelance creators as a take-it-or-leave-it proposition. In exchange for forfeiture of all rights of authorship and copyright, they are paid only for one-time usage of the commissioned work. The publisher or other commissioning party is free to use the work for any other purpose, or to sell it or license it, all without paying the creator beyond the one-time usage fee. As a result, many freelance creators cannot sustain even a minimal degree of financial security.

To make matters worse, many commissioning parties engage in abusive commercial practices which further reduce what little bargaining power freelancers have. Commissioning parties often impose work for hire terms after the freelancer has begun or even completed the work -- after the freelancer has committed valuable time, effort and money to a project and is not in a position to resist those terms. Publishers also impose "blanket" work for hire agreements whereby the freelancer forfeits all rights to all works created in the future. These abuses deprive freelancers of a meaningful opportunity to negotiate with commissioning parties concerning the rights to their work, and are clearly contrary to the intent of the drafters of the work for hire provisions.

S.1253 proposes a step forward in preventing these abuses and would remove some of the barriers to meaningful and effective negotiation between freelancers and the parties that commission their works. In addition, the bill would forestall endless litigation over whether publishers and other commissioning parties are joint authors of the fruits of creators' labors by requiring all contributions to a joint work to be copyrightable, and by requiring a prior written agreement before a commissioned work can be considered a joint work.

TABLE OF CONTENTS

Page

I. Introduction 1

II. The Copyright Act of 1976 was Intended to Encourage Creativity by Offering Creators the Assurance of Fair Compensation and Protection for Their Works 4

III. Work for Hire Is a Narrow Exception to the Rule That the Author and Copyright Owner of a Work is the Party That Creates It. 6

IV. Work for Hire Forever Deprives Freelance Creators Of Their Rights of Authorship and Copyright Ownership, and Thus Threatens Their Survival 9

A. Under Work for Hire Arrangements, Creators are Paid Only for One-Time Usage of Their Work and Receive No Further Compensation From the Commissioning Party's Additional Uses of It 11

B. Under Work for Hire Arrangements, Creators Forfeit All Control Over Their Own Works 14

C. Under Work for Hire, Creators Lose the Ability to Build a Recognizable Body of Work 16

D. In Contrast to an Assignment of Rights, Work for Hire Results in Loss of all Authorship and Copyright Rights Forever 17

E. The Loss of the Fundamental Right to Claim Authorship of One's Work is Morally Offensive 17

F. Work for Hire Results in the Loss of Opportunity to Benefit from Creation and Distribution of Derivative Works 18

G. Even Though a Creator Relinquishes all Rights in His Work to the Commissioning Party, He Receives no Employment Benefits as Would a True Employee 19

H. Work for Hire is a Disincentive to Creativity 20

V. Abuses of the Work for Hire Provisions and Changes in the Marketplace Since 1978 Demonstrate the Need for Corrective Legislation 22

A. The Marketplace for Creative Works Has Changed Dramatically Since 1978 23

B. Since 1978, the Use of Work for Hire Agreements Has Drastically Increased 29

C. Since 1978, Abusive Practices Associated with Work for Hire Contracts Have Proliferated 35

1. Work for Hire Agreements are Non-Negotiable 35

2. Work for Hire Agreements are Often Imposed After-the-Fact 37

3. "Blanket" Work for Agreements are Common 44

4. The Enumerated Categories of Works Eligible for Work for Hire Agreements are Frequently Disregarded 46

5. Commissioning Parties Have Consistently Attempted to Characterize Freelance Creators as "Employees" for Copyright Purposes Only 48

VI. S.1253 Proposes a Moderate and Sensible Step Forward in Preventing Work for Hire Abuses and Clarifies the Intent of the Drafters of the 1976 Copyright Act 51

A. S.1253 Gives Effect to The Intent of The Drafters of the Work for Hire Provisions 52

1. 1963 Preliminary Draft Bill 53

2. 1964 Revisions 54

3. 1965 Compromise 55

B. S.1253 Clarifies The Definition of "Employee" to Effectuate The Intent Of The Drafters Of The 1976 Act 58

C. S.1253 Would Make Clear That Subsections (1) and (2) of Section 101 Are Mutually Exclusive 59

D. S.1253 Would Prevent The Use of Work for Hire Agreements After-The-Fact 60

E. S.1253 Would Bar The Use Of "Blanket" Work for Hire Agreements 61

F. S.1253 Would Make Complementary Changes to the Joint Work Provisions of the 1976 Copyright Act 63

1. Experience Under the Current Definition 64

2. The Amended Definition of Joint Work Would Provide Greater Certainty for the Public and Thus Would Prevent the Explosion of Litigation That Can be Expected Under Current Law 67

a. Intent Requirement 68

b. Originality Requirement 69

c. Prior Writing Requirement 72

3. The Objections to the Addition of a Writing Requirement for Joint Works Are Conjectural and Fail to Give Due Consideration to the Need for an Objective Standard 75

VII. Conclusion 79

Statement for the Record of Richard Weisgrau, Executive Director of the American Society of Magazine Photographers On Behalf of The Copyright Justice Coalition

I. Introduction

Mr. Chairman, my name is Richard Weisgrau and I am currently the Executive Director of the American Society of Magazine Photographers ("ASMP"). I am submitting this statement on behalf of ASMP and the Copyright Justice Coalition ("CJC") in support of S.1253.

ASMP is the largest national organization of professional photographers engaged in the publication of photographs. Most of ASMP's nearly 5,000 members are freelance photographers whose work is produced on a commissioned basis - that is, they are ordinarily retained by a magazine, advertising agency or corporation to take photographs for a specific project.

ASMP members are generally not accorded employment benefits. They are not paid a regular salary, do not receive a paid vacation, and must purchase their own cameras and laboratory equipment. They are responsible for all of the overhead expenses associated with running a business, must pay the costs of their own health and liability insurance, and are not eligible to participate in the pension and retirement plans offered to employees of the commissioning parties. Given these responsibilities and limited resources, the entrepreneurial risks assumed by ASMP members when they accept a commissioned project

are far greater than those of the publisher or advertising agency in undertaking that project.

These characteristics are also typical of the over 100,000 individual creators represented by the CJC, of which ASMP is an active member. The CJC is an ad hoc group of 50 organizations whose individual members include most of the freelance creators in the United States, including photographers, designers, visual artists, illustrators, writers, cartoonists, actors, and songwriters. They produce a vast array of commissioned works for the publishing and advertising industries, and for corporations throughout the United States. A list of the members of the CJC is attached to this statement as Attachment A.

The "work made for hire" provisions of the Copyright Act of 1976 profoundly affect the individual creators throughout the country represented by ASMP and the CJC.[1/] In a work for hire situation, a freelance creator relinquishes all authorship and copyright rights in the work he creates for the party that commissioned the work. The commissioning party is deemed to be the author of the work by statute, and obtains all rights in, and complete control over, the work.[2/] In exchange for forfeiture of all rights, the freelance creator is customarily paid a fee only

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1/ For convenience, the statutory phrase "work made for hire" will be referred to as work for hire.

2/ 17 U.S.C. §101 (definition of "work made for hire").

for one-time usage of the commissioned work. The commissioning party can make whatever future uses of the work it desires -- including reproducing the work, selling it, licensing it, and creating derivative works based upon it -- without compensating the creator for any of these additional uses.

The work for hire doctrine was included in the 1976 Copyright Act as a means of striking a balance between the rights of creators and the needs of parties that disseminate their works. Since enactment of the Copyright Act, however, the work for hire doctrine has in fact been used as an instrument to systematically deprive creators of their rights without fair compensation.

Experiences over the past eleven years have shown that the work for hire provisions are not working as intended. Abusive practices associated with work for hire agreements have proliferated. These practices are described below and are documented by the case statements and attachments submitted with this statement. Simultaneously, drastic changes -- including media mergers, technological advances, and greater reliance on freelancers -- have occurred in the marketplace for creative works. These changes have heightened the negative impact of work for hire.

The time has come to clarify the work for hire provisions of the 1976 Copyright Act to implement the original intent of its drafters, and to correct some of the worst abuses that have made

work for hire agreements endemic and nonnegotiable. These changes are essential to achieve the proper balance between the rights of creators and the needs of parties that disseminate copyrightable works -- the balance that was intended when the Copyright Act was enacted in 1976 but which, unfortunately, has not been realized.

S.1253 does not cure all of the problems that have arisen under the current work for hire rules; however, the bill represents a sensible step in the right direction. The bill proposes moderate, straightforward changes to the work for hire rules, and complementary changes to the joint work provisions of the 1976 Copyright Act. ASMP and the CJC strongly support the changes proposed by S.1253 because they will help give creators a fair and meaningful opportunity to protect and profit from their rights in their own works.

II. The Copyright Act of 1976 was Intended to Encourage Creativity by Offering Creators the Assurance of Fair Compensation and Protection for Their Works

The Constitution authorizes Congress "[t]o promote the Progress of Science and useful arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., Art. I, Sec. 8, cl. 8. The economic philosophy underlying this constitutional authorization is the conviction that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors...." Mazer v. Stein, 347 U.S. 201, 219 (1954).

Thus, a fundamental tenet of our copyright system is that "[s]acrificial days devoted to...creative activities deserve rewards commensurate with the services rendered." Id. at 219.

Acting under this constitutional grant of authority, Congress has enacted federal copyright laws which acknowledge that a creator of copyrightable work has the right to proclaim himself its author and to reap the benefits accorded the owner of the copyright in the work.

The Copyright Act of 1976 confers copyright protection on "original works of authorship". The creative activity entitled to the reward of copyright protection is not the conception of an idea but rather the expression of that idea in an original, tangible form. Thus, an idea is not copyrightable; only the author's expression of that idea warrants copyright protection.

Copyright vests initially in the "author" (or authors) of a work -- usually the party who actually creates the work; i.e., the party who translates an idea into a fixed, tangible expression entitled to copyright protection.

In addition to the ownership of copyright rights, the status of "author" carries with it a more intangible and personal right -- the right to be recognized as the creator of one's own work, the embodiment of a person's unique personality, imagination, vision, creativity and style. In 1884, the U.S. Supreme Court held that a photograph was "an original work of art, the product of plaintiff's intellectual invention, of which

plaintiff [the photographer] is the author" and deserving of protection under the copyright laws. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884). The Court quoted an English case for the proposition that "the author is the man who really represents, creates or gives effect to the idea, fancy or imagination." Id. at 61.[3/] As noted by the Supreme Court, the Constitution intended that Congress should secure for the true author the exclusive right to use, publish or sell his work. Id. at 60.

III. Work for Hire Is a Narrow Exception to the Rule That the Author and Copyright Owner of a Work is the Party That Creates It

The Copyright Act of 1976 carves out a narrow but important exception to the general rule that a creator of a work is both its author and the owner of the copyright in the work. In the case of a "work made for hire", the employer of the creator, or in certain circumstances the party who commissions the work, is deemed to be the "author" of the work, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright. 17 U.S.C. 201(b). Thus, the true author of a work for hire is deprived of the right of authorship and all copyright rights in his work.

3/ A few years later, in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903), the Supreme Court observed that "[p]ersonality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone."

The term "work made for hire" was first defined in the 1976 Copyright Act. In place of the common law principles by which the courts had previously determined when a work should be deemed for hire, the Copyright Act of 1976 established two alternative and mutually exclusive standards for determining whether copyrightable works should be considered works for hire. These standards were the result of an historic compromise between representatives of freelance creators and the industries that commissioned their works.[4/] First, under subsection (1), the definition provides that a work prepared by "an employee within the scope of his or her employment" is a work for hire. No agreement, in writing or otherwise, is required. Instead, the mere nature of the relationship between the employer and employee is deemed sufficient to confer work for hire status upon all works prepared in the course of the employee's employment.

Second, under subsection (2) of the work for hire definition, three elements must be established in order to classify a commissioned work as "for hire": (i) the work must be specially ordered or commissioned, and (ii) the work must fall within one of nine enumerated categories of works;[5/] and (iii)

4/ A complete discussion of that compromise is set forth in Section VI(A) of this statement.

5/ The nine enumerated categories of works are: a contribution to a collective work, part of a motion picture or other audiovisual work, a compilation, or instructional text, a test, answer material for a test, or an atlas.

the parties must expressly agree in a writing signed by them that the work is to be considered a work for hire.

The two-prong work for hire standard contained in the 1976 Act was the result of an effort to eliminate the confusion and unpredictability that had resulted from court decisions interpreting the ambiguous references to work for hire in the 1909 Copyright Act.[6/] In their place, the statutory standard was intended to establish clear guidelines for determining the circumstances in which copyrightable creations may qualify as works for hire.

However, Congress' failure to define the term "employee" in subsection (1) compounded the ambiguities the 1976 Act was designed to eliminate. The absence of a clear definition has allowed commissioning parties to twist the meaning of "employee" in ways which subvert Congress' original purpose. See Aldon Accessories v. Spiegel, 738 F.2d 548 (2d Cir.), cert. denied, 469 U.S. 982 (1984), and other cases discussed below. Many of the most extreme arguments advanced by publishers concerning the meaning of employee have been put to rest by the Supreme Court's decision in Community for Creative Non-Violence v. Reid, 109 S.Ct. 2166 (1989). But the Court's invocation of a multi-factor

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6/ See, e.g., Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565 (2d Cir. 1966); Yardley v. Houghton Mifflin Co., 108 F.2d 28 (2d Cir.), cert. denied, 309 U.S. 686 (1940); U.S. Ozone Co. v. U.S. Ozone Co. of America, 62 F.2d 881 (7th Cir. 1932).

agency law test for determining the meaning of employee occurred because of the absence of any definition of the term by Congress -- a void that S.1253 would fill.

In addition, the requirement in subsection (2) that, in the case of specially ordered or commissioned works, only certain categories of works be eligible for work for hire status and that a written agreement be signed, has been stretched beyond its intended contours by commissioning parties. Publishers and corporations have ignored those categories, and their practices with respect to the imposition of overbroad, after-the-fact work for hire agreements are abusive and violative of Congress' intent.

IV. Work for Hire Forever Deprives Freelance Creators Of Their Rights of Authorship and Copyright Ownership, and Thus Threatens Their Survival

Before discussing the specific problems and abuses of the work for hire rules that have occurred over the past decade, it is important to understand exactly what work for hire status means to freelance creators. In short, if a particular work is considered "for hire", the creator of the work is deprived of all rights of authorship and copyright, forever -- he is not considered the author of the work and he owns no copyright rights in the work. These rights vest automatically and entirely in the employer or commissioning party. Yet the intangible rights of authorship and copyright are the only valuable business assets that most freelance creators have.

Freelancers rely heavily for basic living expenses on the income-producing potential that accompanies ownership of the copyrights of their works. If the creator owns the copyright in a work, he can sell, assign or license the work and can use that work as the basis for creating derivative works. Retention of copyright rights and the potential income such rights may produce over the years is the only reliable source of sustained income that many freelancers have. Under a work for hire arrangement, those rights are lost forever -- and at a stage when the economic value of the work and its derivatives over the life of the copyright cannot be known. Many freelancers have found their ability to maintain even a minimal standard of living, indeed their very survival, threatened because of the loss of their copyright rights under work for hire agreements.

In exchange for paying the freelancer a fee reflecting one-time usage rights for the work, the party that commissioned the work obtains all rights in the work and gets complete control over, and all the income produced from, all future uses of the work and its derivatives. The freelancer retains no copyright rights, gets no employment benefits that would warrant foregoing the benefit of retaining copyright rights, and, in addition, loses the right to be considered the author of the work -- a right which is critically important to freelancers in order to build a recognizable body of work and a reputation to attract new clients.

The case statements submitted for the record as Attachment B to this statement detail the personal experiences of freelance creators under work for hire arrangements and the adverse impact that work for hire has had on their work and their lives. I would like to discuss in further detail the effects on freelance creators of work for hire arrangements, highlighted with the personal experiences of several creators.

A. Under Work for Hire Arrangements, Creators are Paid Only for One-Time Usage of Their Work and Receive No Further Compensation From the Commissioning Party's Additional Uses of It

Under a work for hire arrangement, the freelance creator does not receive a fee commensurate with the value of the work over the term of the copyright in the work; rather, the creator is paid a fee only for the use of the work originally intended. The commissioning party, on the other hand, is free to use the work for any other purpose, to adapt it for other uses, or to license it to other users or disseminators -- all without paying the creator compensation for these uses. Thus, it is clear that commissioning parties get "something for nothing" under work for hire arrangements. For a small fee, they obtain the rights to exploit the copyright in a work in whatever manner they wish, to retain complete control over uses of the work, and to reap all financial rewards from further uses of the work.

Under a work for hire agreement, the commissioning party gets many more rights than it may need or want, without having to negotiate with the creator for a limited transfer of certain rights. The entire bundle of rights that comprise the copyright is vested in the commissioning party from the outset without that party having to pay adequate consideration for them.

The irony is that most freelancers are generally willing to assign to publishers or other commissioning parties all rights necessary for them to exploit the work for the particular use or uses intended. But by imposing work for hire agreements on freelancers, commissioning parties do not have to negotiate for those rights.

The loss of rights to the income generated from additional uses of a commissioned work threatens the ability of many freelance creators to earn a living and stay in the business. This point is best illustrated by the personal experiences of several creators whose statements have been submitted.

Joseph Nettis, a photographer for over 35 years and a member of ASMP, states that work for hire deprives him of income needed for his retirement. Mr. Nettis is sixty years old and considers stock photographs (primarily outtakes and seconds sold to stock houses) to be his retirement fund. Under work for hire arrangements, Mr. Nettis is prevented from re-using photographs for stock and is thereby deprived of the income potential of those photographs. He states, "If a stock photo is generic

enough, it can have a re-sale life of ten to fifteen years. This income is vital to me for the time when I am no longer able to carry out assignments." See Attachment B.[7/] Under work for hire, Mr. Nettis forfeits all rights in his photographs and is denied this essential income.

Elle Schuster, a well-known photographer who was forced to sign a work for hire agreement presented to her by Time, Inc. after she completed the work,[8/] states that work for hire represents a significant loss of potential income. She states that her photographs may be worth many thousands of dollars over the course of a lifetime. Under work for hire, the publisher, not the creator, gets the right to that income.

James Cook, a photographer, states that work for hire has made a significant dent in his stock business. Mr. Cook estimates that from one-third to one-half of his income is generated from re-sale of his photographs. Forfeiting all rights under work for hire agreements means a significant loss of stock sales. Mr. Cook states he is looking at other fields of work because he is not convinced there is a future in photography.

Daniel Pelavin, an illustrator and member of the Graphic Artists Guild, states:

7/ The individual case statements are contained in Attachment B in alphabetical order.

8/ Ms. Schuster's experiences with Time, Inc.'s work for hire policy are discussed more fully below.

> [Under a work for hire contract] the fee that you are receiving covers all reproduction rights forever and ever. You will not see another penny, no matter how many times or ways the art is reproduced....To a freelance artist, work-for-hire means taking all the risk and receiving none of the benefits.

Michal Heron, a professional photographer, states that of the 15 regular clients she had in the last 16 years, she lost five -- one-third of her client base -- because of her opposition to work for hire. She states "work for hire makes my future in my profession bleak."

B. Under Work for Hire Arrangements, Creators Forfeit All Control Over Their Own Works

In addition to losing the financial benefits from further uses of the work, under a work for hire arrangement the creator relinquishes all control over how the work is displayed, reprinted, reused or sold. The creator has no right to display or reprint the work himself.

This loss of control suffered by freelancers also affects the public. Under work for hire, the works of freelance creators often end up in the forgotten file cabinets of publishers or other corporations, never to be seen by the public. This result is contrary to the basic purpose of our copyright system -- to encourage and allow creators to contribute to this country's artistic and cultural heritage.

The statement of Dana Sigall, a photographer, vividly illustrates the practical effect of this loss of control over one's own work. Ms. Sigall agreed to take photographs for a particular company with whom she had previously worked. The company presented her with a work for hire contract, which meant that, among other things, Ms. Sigall would have to give up the right to her negatives. This, in turn, meant that anyone would be able to re-print from the negatives, likely resulting in inferior photographs which would be attributable to Ms. Sigall. Although Ms. Sigall attempted to sell the company whatever rights it actually needed, the company refused; it insisted on a work for hire contract. Having no other choice, Ms. Sigall signed the contract. Then she learned that the company, along with her negatives, was gone. She states "somewhere, someone has my negatives and can reprint my photos any way they see fit. They can use my name or not. Those photos have gone, completely out of my control." Ms. Sigall also states that she has lost money from not being able to resell prints of her work.

Roger Allen Grigg, a freelance photographer, explains that because, under work for hire, the commissioning party is free to make whatever future uses of the photograph it wishes, the photograph may be used for a purpose that was never intended, thereby impugning the photographer's reputation.

D. L. Cramer, a medical illustrator, states that a good anatomy textbook is about 50 percent illustration. Under work for hire arrangements, publishers can alter the artwork, print over it, rearrange it and use it again and again. Mr. Cramer states "it's more than a question of financial compensation - the integrity of my work is at stake."

C. Under Work for Hire, Creators Lose the Ability to Build a Recognizable Body of Work

The loss of control over one's own work under a work for hire arrangement means that, since the freelancer retains no authorship or copyright rights in his work, he cannot even use copies of the work in his portfolio for promotional purposes and cannot compile a recognizable body of work, attributed to him, over time. Creators build their reputations, and their ability to attract new clients, on the basis of past performance. Loss of the right to claim authorship severely affects a creator's ability to build a reputation and stay in business. This excerpt from the statement of photographer Roger Allen Grigg, attests to the effect of work for hire on a creator's ability to create a portfolio and a recognizable body of work:

> Work-for-hire produces several economic consequences for me--first and foremost it affects my portfolio. No one is going to hire a photographer on the basis of a resume and an oral description of his work. They want to see samples. If I do work-for-hire, the photographs do not belong to me. I do not have anything I can put in my portfolio. I cannot use the photograph in my promotion. I cannot even say that I did it. If a potential client wants to be a "nice guy", he can assign me back my own photo

for use in my portfolio, but then I have given something that's mine and I have to beg to have it back.

D. In Contrast to an Assignment of Rights, Work for Hire Results in Loss of all Authorship and Copyright Rights Forever

Under a work for hire arrangement, the creator loses all authorship rights in the work forever and loses all copyright rights in the work for the duration of the copyright term. In contrast to an assignment of copyright rights, in the case of a work for hire the creator cannot terminate the rights vested in the commissioning party: the commissioning party automatically obtains all rights in the work from the outset and the creator cannot re-claim them. Cf. 17 U.S.C. § 203(a)(3).

E. The Loss of the Fundamental Right to Claim Authorship of One's Work is Morally Offensive

A freelance creator loses the right to be considered the author of his own work under a work for hire agreement. The creator cannot require a commissioning party to acknowledge his authorship of a work for hire because the statutory "author" is the commissioning party and not the creator. This loss of authorship rights is fundamentally at odds with the constitutional imperative that the creator of a work should be recognized as its author. It is morally offensive to a creator to lose his right to be considered the author of his own work -- work which represents his unique personality, individuality, creativity, vision, style and efforts, or, as described by the

Supreme Court: "something irreducible, which is one man's alone". Bleistein v. Donaldson Lithographing Co., supra.

F. Work for Hire Results in the Loss of Opportunity to Benefit From Creation and Distribution of Derivative Works

Under a work for hire arrangement, the creator cannot use the original work as the basis for creating derivative works; that right also vests in the commissioning party upon creation of a work for hire. The right to create derivative works, and to reap the financial rewards from distribution of such works, is becoming increasingly important and valuable in this technological age.

Advances in computer and electronic technology have resulted in an enhanced value for copyrighted works. Using a computer, it is now possible to manipulate images so that original photographs may be re-used over and over in their altered forms. The more uses that are made of the changed photograph, the higher the revenues from those uses. The value of copyright rights in a photograph becomes greater and greater as the ways to manipulate and re-use that photograph increase.

Another recent technological advance is the ability to input images into computer databases. This allows a database owner, or user, to reproduce and disseminate computer-generated images of the original. The revenues that may be generated by such additional uses of the image are limitless, resulting in a greatly enhanced value of copyright rights in the disseminated work.

Obviously, the owner of the copyright in works which are manipulated and disseminated via computer benefit tremendously from these uses. In a work for hire situation, it is the publisher or other commissioning party that is entitled to these benefits -- the creator gets nothing.

G. Even Though a Creator Relinquishes all Rights in His Work to the Commissioning Party, He Receives no Employment Benefits as Would a True Employee

Under a work for hire arrangement, a creator is, in effect, considered an employee of the commissioning party for copyright purposes only. That is, the creator forfeits all copyright rights to the commissioning party, but unlike a true employee, receives no employment benefits that would perhaps warrant giving up the benefits of retaining those rights.

Freelance creators are responsible for all overhead expenses associated with running a business, must pay their own health and liability insurance and are not eligible to participate in the pension and retirement plans offered to employees of the commissioning parties. They do not receive a regular salary or a paid vacation. Despite receiving none of the benefits associated with formal employment, they relinquish all rights to their works.

The statement submitted by Reagan Bradshaw demonstrates the inequity of this situation. Mr. Bradshaw relates how he once had a job as a staff photographer for a monthly magazine and received

all of the usual employment benefits. After a while, Mr. Bradshaw became dissatisfied. As he puts it, "I was pouring my time, my energy, my soul into the creation of those photographs and they belonged to my employer. That was part and parcel of being an employee, and in return for that, I received all the above benefits. But it was still not enough for me." Mr. Bradshaw went into business for himself, bought his own equipment, rented studio space, purchased health insurance and other benefits. However, after enactment of the 1976 Copyright Law, clients began asking Mr. Bradshaw to sign work for hire agreements which make him an employee for copyright purposes but an independent contractor for all other purposes. "Meaning I get to take all the risks and bear all the expenses of being in business...and the client gets ownership of the work. It's the worst of both worlds and a subversion of the original intent of Congress [which was] to award ownership to the creator."

H. Work for Hire is a Disincentive to Creativity

An effect of work for hire that cannot be overlooked is that it is demoralizing and discouraging to creators. Because, under work for hire arrangements, creators are faced with little prospect of receiving just compensation for their works and are forced to relinquish their rights of authorship, work for hire is a disincentive to creativity. Creators are discouraged not only from staying in business but also from producing works of real quality that will have an enduring impact on the marketplace.

The personal statements submitted for the record reveal the demoralizing effect work for hire has had on freelance creators.

Teri Gilman, a member of ASMP and a freelance photographer, states:

> Photography is a difficult art and the demands are great. Each time we do a photograph, we make a new little invention. The work begins long before and continues long after the picture is produced. Work for hire destroys the creative incentive and it's going to destroy quality work.

Peter B. Kaplan, a professional photographer for over ten years, states that "you never put as much love and time into work for hire as you do into work you own, which has your imprint."

Reagan Bradshaw states:

> The great satisfaction of an artist is in the creation and control of his life's work. And control means copyright ownership. Without that ownership, we do not have a body of work to sculpt and husband throughout our careers. We have only today's shoot and the hope of another shoot tomorrow until we're too old or too tired or too discouraged to keep shooting.

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Because work for hire threatens the ability of creators to stay in business and denies creators their inherent authorship rights, it is vital that the scope of the doctrine be confined to the limits that Congress originally established and intended.

V. Abuses of the Work for Hire Provisions and Changes in the Marketplace Since 1978 Demonstrate the Need for Corrective Legislation

Implementation of the work for hire provisions in practice, and changes in the marketplace over the last decade, have shown that those provisions are not working as intended and are fundamentally at odds with the basic purposes of the copyright laws. As noted above, those laws are intended to encourage creativity by offering creators the assurance of fair compensation and protection for their works while at the same time ensuring that society reaps the benefits associated with the enjoyment and use of those works.

But the work for hire provisions have turned the purpose of the copyright laws on its head. Instead of assisting and encouraging creators, the copyright laws have been used as a weapon to deprive creators of their rights and to discourage creativity. Freelance artists, writers and photographers have become the victims rather than the beneficiaries of the laws that were designed to sustain them.

Since 1978, work for hire agreements have proliferated and the safeguards in the work for hire provisions, which were intended to ensure a meaningful opportunity for freelancers to decide whether to agree to a work for hire arrangement, have failed to work in practice. Abusive practices by publishers have become widespread and have proved disastrous to freelance creators. These abuses and their effect on creators are discussed in detail below.

In addition, commissioning parties have seized upon the absence of a clear definition of the word "employee" in the 1976 Copyright Act, arguing that freelancers are "employees" for copyright purposes only. The result has been confusion in the courts and unpredictablity in the relationships between creators and the parties that commission them.

At the same time, dramatic changes in the marketplace have occurred, especially in the area of mergers and acquisitions of publishers and other media and entertainment companies. These changes have significantly reduced the number of entities that commission freelance talent -- and thus the risks to one's career of turning down work for hire agreements are greater than ever.

A. The Marketplace for Creative Works Has Changed Dramatically Since 1978

Since the Copyright Act of 1976 went into effect, the relationship between freelancers and the parties that commission their works has changed dramatically.

Due to the consolidation of media companies over the last several years, the marketplace has severely contracted. The result is a much more limited range of clients for freelancers to do business with, and, at the same time, a substantial decrease in bargaining position. Most freelancers lack the bargaining power to engage in meaningful negotiations with media conglomerates, with their vast corporate and legal resources. As the media companies become fewer, larger and more powerful, the

opportunities to negotiate diminish, and what little bargaining power freelancers have disappears. The current work for hire provisions, and their abuse by media companies, only add to the inequality in bargaining positions.

Here are some startling facts about several of the largest media conglomerates in the world today and the shrinking of the marketplace: Time, Inc., prior to its merger with Warner Communications, Inc., controlled 40% of all magazine revenues in the United States. In its 1988 Annual Report, Time, Inc. acknowledged that the media and entertainment industry has been "radically reconfigured" during the past several years. "As a result of mergers, acquisitions and joint ventures undertaken to achieve the size necessary to compete in the international marketplace, there is now a limited number of global giants...Time, Inc. is one of them." In the same report, Time blatantly proclaimed its intention to acquire and exploit the copyright rights of creators:

> By the mid-1990s, the media and entertainment industry will consist of a handful of vertically integrated, worldwide giants. Time, Inc. will be one of them...In the media and entertainment business of the future, the winner will own the copyrights to creative products. We intend to increase our ownership of both.

The losers, of course, are the individuals without whose talent and imagination those products would never exist. Time's recent merger with Warner will only increase its acquisitive desires and

its leverage over creators. That merger has made Time's prediction of "a handful" of vertically integrated worldwide media giants a reality.

Fewer than two dozen firms control half or more of all the business combined in all daily newspapers, magazines, broadcasting, books, and motion pictures.[9/] In the magazine industry alone, just three corporations control over half the business in this country.[10/] Time, Inc., for example, owns Time, Fortune, Sports Illustrated, Sports Illustrated for Kids, People, Life, Student Life, Asiaweek, Yazhou Zhoukan, Southern Living, Progressive Farmer, Southern Accents, Cooking Light, and Travel South. In joint venture it also owns McCall's, Working Woman, Working Mother, Baby, Parenting, Hippocrates, President, Fortune France, Fortune Italia, Time Distribution Services, Whittle Communications, and American Family Publishers. Each of these acquisitions represents a shrinking of the negotiable markets for freelancers. It also represents a frightening prospect to freelance creators who sign work for hire arrangements with any of these entities. Consolidation of the media companies means that a publisher can pay a small, one-time fee for a work and

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9/ Statement of Ben H. Bagdikian, University of California at Berkeley, before the Commerce Subcommittee on Communications, the Committee on Commerce, Science and Transportation of the U.S. Senate, Hearings on Media Concentration, June 14, 1989, p. 2.

10/ Id. at p. 3.

re-use that work over and over again in all of its publications, without compensating the creator for the additional uses.

For example, if a photographer were to accept a commission to photograph a mother and child at play for McCall's, it is not inconceivable that the same picture would be used in a subscription appeal for the magazine, in a Time-Life book on parenting, in Working Woman and Working Mother and maybe even in advertisements for the magazines.

The photographer of a cover for Sports Illustrated could see his picture of airborne Michael Jordon exploited in advertising, on TV, posters, or trading cards, and syndicated in other publications around the world to a wide variety of potential users with no additional compensation to the photographer.

Another huge media company is Gannett Co., Inc., which owns 245 newspapers, television stations, radio stations and other companies. Under its work for hire agreement, for one small fee, Gannett would purchase the right to use a photograph in 90 daily newspapers, 36 non-daily newspapers, 10 television stations, 16 radio stations, six international division offices, five "New Media" ventures, 15 news service bureaus, seven printing plants, outdoor advertising outlets in 48 cities, four television programming companies and two miscellaneous enterprises.[11/] This

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11/ These statistics are taken from an article in Photo District News, September 1988, pp. 32, 34-35, quoting Gannett's annual

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fact is even more disturbing when one considers Gannett's revenues: total operating revenues for the fiscal year ending December 27, 1987 were over $3 billion, and Gannett's total assets have a value of over $3 billion.

Publishers of periodicals generally profit not from the sale of the publication per se, but from the sale of advertising space in the magazine. The revenues generated from the sale of advertising space is enormous, particularly when compared to the fee received by a freelance photographer commissioned by the publisher. For example, Time magazine charges its advertisers $96,285 for a full-color page of advertising, while a photographer shooting a photograph for the same issue of Time receives a rate of $350 per day.[12/]

The contraction of the media marketplace leaves the freelancer with fewer and fewer options: if a handful of companies control virtually all of the media and entertainment industry in the United States, and virtually all of them use work

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(Footnote cont'd from previous page)

report for 1987. The article is attached to this Statement as Attachment C. The same article states that USA Today sends its freelance contributors letter agreements which state "...you agree that your work shall be a work for hire and that this letter transfers to USA Today and its affiliated corporations all copyrights in your work throughout the world. Gannett Co., Inc. and its affiliated operations and licensees will have worldwide exclusive publishing rights to the material...."

12/ See Photo District News, August 1989, pp. 40-41.

for hire arrangements, the freelancer has no choice but to do business with these companies and forfeit all rights in his work. There is very little chance of meaningful negotiation with these powerful entities. At the same time, media companies have come to rely more and more on freelancers in place of in-house staffers. Using freelancers allows these companies to get highly original creative work, for a low fee, without having to incur overhead or pay employment benefits to the freelancer. And, under work for hire arrangements, the media companies get all rights in the work.

Finally, the consolidation of the market creates a substantial likelihood that a large percentage of this nation's creative output will be controlled by (and languish in the file drawers of) a few select media giants.

Another significant change in the marketplace is that tremendous advances in electronic technology and computer capabilities have occurred over the last several years. As described above, the capability of manipulating and disseminating images by computer has greatly enhanced the value of copyright rights in them. Retention of copyright rights in photographs and other works susceptible to computer manipulation and dissemination has become, and will become, more important and more valuable as technological advances continue to be made.

* * *

The present (and future) state of the marketplace for creative works supports tightening the legal framework applicable to the dealings between freelancers and the parties that commission them. Freelancers must be given greater opportunities to negotiate with media conglomerates for the rights those entities truly need or want, and for a fair price. The disparity in bargaining power between freelancers, on the one hand, and publishers or other large corporations on the other, is becoming wider as the marketplace contracts. The amendments to the work for hire provisions proposed by S.1253 would help to achieve an appropriate balance in that relationship.

B. Since 1978, the Use of Work for Hire Agreements Has Drastically Increased

After the Copyright Act of 1976 went into effect in 1978, freelance creators experienced a dramatic change in their business relationships with their clients. Before 1978, many publishers and newspapers were satisfied with securing one-time publication rights, and advertising agencies and corporations were content with a limited grant of rights, in exchange for the fee paid for the commissioned work. The explicit authorization of work for hire agreements in the 1976 Copyright Act, however, resulted in a proliferation of those agreements, under which freelancers were still paid only a one-time usage fee, but in return, relinquished all rights in their works.

Once the magic words "work for hire" are in a contract, all authorship and copyright rights of the creator are gone. The work for hire contracts submitted for the record as Attachment D to this statement clearly illustrate the confiscation of rights that occurs when a freelancer is confronted with, and many times forced to sign, a work for hire agreement. In some contracts the work for hire status of the work is blatantly described, while in others that status is hidden in small print. I would like to highlight here a few specific examples.

1. Several companies insert "work for hire" language on one page purchase orders given to the freelance creators they engage. For example, Check Mark Promotion & Marketing Services, a division of Ralston Purina Company, uses a one page purchase order which, in small print in the lower left corner, states: "By accepting this order, Supplier agrees that the above mentioned work is done under the Work-for-Hire Provision of the 1976 Copyright Act . . . ."[13/] (See Attachment D-12).

2. Similarly, DuPont has used a "Marketing Communications Dept. Creative Services Estimate", which later becomes the purchase order, which states (in the left hand corner) that "Services/Materials purchased hereunder shall be "Work for Hire" under the copyright laws." (See Attachment D-21).

13/ The names of the individual parties to each contract or purchase order have been redacted to protect their identities.

3. Polaroid's form contains merely the words "work for hire" with a box next to those words, which is checked. (See Attachment D-16).

4. IBM uses purchase orders which state that " . . . the photography & all component elements thereof, including but not limited to any color transparencies, negatives/prints, shall belong exclusively to IBM & shall be deemed to be works made for hire." (See Attachments D-10, D-22).

5. Saatchi & Saatchi, one of the largest advertising companies, uses a purchase order which contains work for hire language in small print on the back. (See Attachment D-2).

6. Curriculum Concepts, a Dialogue Systems Company, uses a purchase order for design, art and photography which states that "[a]ll work prepared under this agreement shall be "work made for hire . . . ." (See Attachment D-14).

7. Houghton Mifflin Company, a large publisher, has used a letter of agreement for the purchase of photography which states, among other things, that "the work to be prepared by you shall be considered a work made for hire to the extent permitted by the copyright law of the United States, and all rights of ownership and authorship in the work throughout the world shall vest in Houghton Mifflin Company." (See Attachment D-19).

8. Anheuser-Busch uses an agreement which provides that "you [the creator] agree that all creative works, including preliminary works, generated by the performance of your

services . . . shall be considered works made for hire within the meaning of the United States Copyright Act." The agreement further states, "notwithstanding the foregoing, you agree that you will otherwise perform your services as an independent contractor and not as an employee of the Company." (See Attachment D-9).

9. An agreement sent by Intertec Publishing Corp. (for the journal Broadcast Engineering) to a photographer provides for the purchase of a photograph and prints for the princely sum of $150.00 and provides, "you acknowledge that all material will be prepared by you and that all materials prepared or to be prepared shall be considered as a "Work Made For Hire" as that term is defined in Section 101 of the U.S. Copyright Law." (See Attachment D-18).

10. Apple Computer, Inc.'s independent consultant agreement provides, in paragraphs 4 and 14, that all works supplied thereunder shall be deemed works made for hire. (See Attachment D-17).[14/]

The Supreme Court's June 5, 1989 decision in the Reid case makes it more difficult for commissioning parties to argue that freelance creators are "employees" under subsection (1) of the

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14/ All of the contracts mentioned are found in Attachment D to this statement. Several contracts, other than the ones listed here, are discussed below in the discussions of "after-the-fact" and "blanket" work for hire agreements.

work for hire provisions. As a result, the use of work for hire agreements by commissioning parties will undoubtedly increase.

We are already beginning to see this response in the marketplace. For example, on June 12, 1989, one week after the Reid decision, Ross Roy, Inc. revised its "standard terms and conditions" for purchasing artwork. The new terms and conditions state, in part, that the parties agree that "the goods shall be a work made for hire", and further state that "Vendor's [the creator's] deposit of Agency's check for payment due hereunder shall constitute a writing between Vendor and Agency required pursuant to 17 U.S.C. Section 101 in connection with works made for hire." (See Attachment D-3). Apparently, it was not enough for Ross Roy to state, as a term of the transaction, that the work is for hire; the company felt it necessary to also state that the check received by the creator, after the work was completed, is deemed, upon deposit, to constitute a written work for hire agreement, regardless of the type of work created.

Another example of a company's change in policy after the Reid decision highlights the extent to which large corporations are willing to blatantly take advantage of the freelancer's inferior bargaining position. On July 31, 1989, DuPont sent a letter to a freelance photographer stating that "a recent case before the U.S. Supreme Court will require that we add another paragraph to our photo agreement with our vendors" (emphasis added). The proposed paragraph is as follows:

> "Du Pont and Independent Contractor also hereby expressly agree for good and sufficient consideration tendered and received that should Du Pont not already own by operation of law or otherwise all copyright rights in the work product to be produced pursuant to this contract, Independent Contractor hereby sells and/or assigns any and all rights, title and legal interest he/she may have in such work product to Du Pont."

The letter ends with the following condescending, but deliberate attempt to exploit the unequal bargaining positions of the parties: "I hate to subject creative types to this mind-numbing legalese, but I'd appreciate your reaction." (See Attachment D-4). Although it requests the creator's "reaction", the letter makes perfectly clear that DuPont's legal department requires the addition of the quoted paragraph to the photo agreement, which already states that all photographs are "works for hire".

Moreover, the statement that the Supreme Court's decision in Reid requires the addition of assignment language to a contract is wrong and is deceptive. The Reid decision set forth the appropriate standards for determining "employee" status. DuPont's statement can only be viewed as an attempt to take advantage of the freelancer's lack of legal acumen and resources.

Finally, DuPont's attempt to induce the freelancer to agree to the additional language by characterizing it as bothersome, "mind-numbing legalese" is simply unconscionable. DuPont is well aware of the important legal rights it is asking the freelancer to give up (whether overkill or not); its letter is a deliberate

(and typical) attempt to take advantage of the disparity in bargaining power between commisioning parties and freelancers.

We can expect to see more and more work for hire agreements and corporate "policy" changes after Reid.

C. Since 1978, Abusive Practices Associated with Work for Hire Contracts Have Proliferated

Not only have commissioning parties used, and continue to use, the types of agreements described above, but even more unconscionable are the coercive tactics and abuses that have occurred in conjunction with them, which are discussed below.

1. Work for Hire Agreements Are Non-Negotiable

Commissioning parties very often will not negotiate work for hire agreements, thereby presenting freelancers with a "take-it-or-leave-it" situation -- "either sign the work for hire agreement or you don't get the work." This coercive tactic is common. The problem many creators face is that they are not in a financial position to "leave it", and lack the bargaining position to resist work made for hire terms. If virtually all of the freelancers' clients insist on work for hire agreements, there may simply be no where else to turn. Those that do resist find themselves losing future assignments from publishers who only deal with freelancers willing to sign work for hire agreements.

Many of the case statements submitted for the record provide specific examples of work for hire contracts presented to freelancers as a take-it-or-leave-it proposition.

For example, Peter B. Kaplan, a freelance photographer, recalls several experiences with Eastman Kodak, in which Kodak insisted that Mr. Kaplan sign a work for hire contract. On one occasion, Mr. Kaplan's refusal to sign a work for hire contract resulted in the loss of a $5,000 job. In addition, Mr. Kaplan was "fired" from his volunteer work as the "preferred photographer" for the Statue of Liberty-Ellis Island Foundation because of his refusal to agree to a work for hire agreement.

William Rivelli, a photographer who specializes in corporate photography, states that he has lost a great deal of work because of his stand against work for hire.

E. Alan McGee, a photographer based in Atlanta, Georgia states that he was, in effect, forced to sign a work for hire contract with a long-time client. The company had informed Mr. McGee that unless he signed the contract, he could not work for the company. Mr. McGee estimates that he lost no less than $200,000 from the relinquishment of his rights to that company.

Jim Carson, an illustrator and member of the Graphic Artists Guild, relates that he once was asked to do work for Fawcett Publications. After discussing the job and price, the publisher insisted on a work for hire contract. Mr. Carson refused to sign the contract even though he was willing to sell

the publisher all rights and to let the publisher have his original artwork. The publisher still insisted on a work for hire contract. Mr. Carson decided not to do the work. He states that "[i]f I worked more in publishing, I'm sure I would feel more pressure to take work for hire."

Dana Sigall, a photographer, also recalls that a regular client of hers insisted on a work for hire agreement even after she offered to sell the client whatever rights it needed. Ms. Sigall was forced to sign the contract because she needed the work.

Michal Heron, a photographer for over twenty years, states that a particular client refused to negotiate concerning the rights it needed and insisted on a work for hire agreement. Ms. Heron turned down the project, which had a value of 20 percent of her annual income, plus more in potential stock sales.

2. Work for Hire Agreements Are Often Imposed After-the-Fact

A common abusive practice of commissioning parties is to foist a work for hire agrement upon a freelance creator after the work has been started or even after the work has been completed. After work has been commenced, creators are likely to have committed valuable time and resources to the project and may have no alternative but to sign the work for hire agreement to cover their expenses and investment of time. After the creator's time, effort and money are spent on a project, it is extremely

difficult, if not impossible, to avoid signing a work for hire agreement which the commissioning party refuses to negotiate.

Even worse, in some cases commissioning parties force the creator to sign a work for hire agreement as a condition of payment once the work is completed and accepted. The most egregious example of this practice occurs when a freelancer receives a check from the commissioning party, representing payment for the work, with work for hire terms stamped on the back of it. The personal experiences of two reputable and talented artists illustrate the use of work for hire agreements imposed "after the fact" by two very large and well-known publishers.

The first case involves Elle Schuster, whose personal statement has been submitted for the record. Ms. Schuster is a studio photographer who is well known for her large format multiple exposure surreal images. Ms. Schuster has enjoyed considerable success and is a classic example of a photographer who attracts clients because of her personal creative vision, style and consistency. She is a photographer who takes an idea and delivers an exciting, unique, and original tangible expression of that idea.

In the autumn of 1987, Ms. Schuster was contacted by Time, Inc. to create a cover for Time magazine on the topic of "The Greenhouse Effect." Time, Inc. had been impressed by Ms. Schuster's work and asked her to do the cover for an upcoming

issue. By telephone, Ms. Schuster and Time's art director discussed the content of the photograph, and agreed upon a fee of $3,000 plus expenses. The art director encouraged Ms. Schuster to begin work on the project immediately. Ms. Schuster ordered props, and shot photographs for two days. Once she had finished shooting, Ms. Schuster sent the film to Time. Time was very pleased with the work and asked for Ms. Schuster's bill.

A few days later, Ms. Schuster received a contract which stated that the work was a "work for hire" and that Time owned all rights to the work. (A copy of that contract is attached to Ms. Schuster's statement.) Ms. Schuster refused to sign the contract and amended it to give Time the rights it needed but to allow Ms. Schuster to retain the copyright. Time flatly refused to agree to these changes and informed Ms. Schuster that unless she signed Time's work for hire contract, the photograph would not be published on the cover. Ms. Schuster feared that in that event, she would not be paid for the expenses she had already incurred on the project.

Ms. Schuster was forced to sign the work for hire contract in order to be paid for her work, even though she had negotiated the price for the work based on a single-use fee and a work for hire arrangement had never been discussed in negotiations. The relinquishment of her copyright rights in the photograph represents a significant loss of potential income to Ms. Schuster. She states that some of her photographs have sold

dozens of times and are worth many thousands of dollars over a lifetime. By being forced to sign a work for hire agreement with Time, after the work was completed and accepted by Time, Ms. Schuster has lost all rights to any income from the photograph and all control over it, while Time, Inc. can make whatever uses of the photograph it wishes and has the exclusive right to its income-producing potential.

The case of Stan Malinowski is another example of a work for hire agreement being imposed on a creator after the commissioned work has been completed and accepted by the commissioning party. It also illustrates the consequences to freelancers of attempting to refuse work for hire terms.

Stan Malinowski is a well-known fashion and beauty photographer based in Chicago who accepted photographic assignments from Playboy magazine on the basis of oral agreements specifying that Playboy would pay him for his services and any expenses incurred in the course of the shoot. The oral agreements did not cover copyright ownership of the photographs and Malinowski did not accept the usual assignment sheets reserving Playboy's copyright in the photos.

After Malinowski provided the invoice for one of his commissions, he received payment in the form of a check with the following legend stamped above the space for endorsement: "ANY ALTERATION OF THIS LEGEND-AGREEMENT VOIDS THIS CHECK. IT CONTAINS THE ENTIRE UNDERSTANDING OF THE PARTIES AND CANNOT BE

CHANGED EXCEPT BY WRITING SIGNED BY BOTH PARTIES. BY ENDORSEMENT, PAYEE: acknowledges payment in full for the services rendered on a work made for hire basis in connection with the work named on the face of this check, it confirms ownership by Playboy Enterprises, Inc. of all rights, title, and interest including all rights of copyright, in and to the work."

Malinowski covered the legend with liquid paper and added his own copyright claim to the check: "All photos: copyright Stan Malinowski 1986". He then deposited the check in his bank. Subsequently, Playboy reclaimed the proceeds from the check, informing the bank that the check had been tampered with and was not legally payable. In turn, Malinowski wrote to Playboy, reaffirming his claim of copyright ownership and warning the magazine against unauthorized use of the photos. When the publisher used some of the photos in question in later editions, Malinowski sued for copyright infringement. Playboy countersued, accusing Malinowski of fraud and racketeering for altering checks. During the same period, the magazine refused to pay Malinowski for another set of commissioned photographs which had been completed because the photographer had refused to sign Playboy's assignment sheet for the job and had deleted their agreement from the disputed check, as well as previous checks.

The judge in Malinowski's case ruled that the dispute turned upon non-payment rather than copyright infringment and the racketeering charges were dismissed. However, Playboy vowed to

pursue its check-tampering claims on appeal if Malinowski did not sign an agreement relinquishing his copyright in the disputed photos in return for payment. Playboy also refused to pay previously promised expenses.

Ultimately, Malinowski acquiesced and signed the agreement forfeiting his copyright rights. He had incurred over $70,000 in legal fees, and initial estimates for prosecuting the copyright infringement question on appeal were set at $30,000. He was forced to liquidate assets merely to stay afloat during this period. His case starkly illustrates the fact that it is no simple matter to refuse to sign a work for hire agreement -- especially one imposed after completion of work.15/

Burt Silverman, an illustrator with over 25 years of experience, recalls in his statement that CBS records presented him with a work for hire contract after he had completed an album cover for CBS and had submitted invoices to CBS for the completed work. Mr. Silverman was told by a CBS representative that he would not get paid unless he signed the work for hire contract and could not work for CBS records unless he agreed to work for hire contracts as a matter of policy.

15/ Another example of work for hire language printed on the back of a check given to a creator upon completion of an assignment is Attachment D-6 to this statement. Language stating that the material described on the face of the check is a work made for hire appears on the back of that check, which was received by an illustrator from Family Circle.

In another case, the artist was handed a blank piece of paper stamped with work for hire language after he turned in his assignment to the commissioning party.

Another example of an after-the fact work for hire contract appears as Attachment D-1 to this statement. BHN, an advertising and public relations company, earlier this year adopted a work for hire policy, after entering into an agreement with a freelance photographer for a particular project. BHN's letter to the photographer requested that he sign the enclosed agreement, which states that in consideration of the receipt of $1.00 by the photographer, "all work" performed by the photographer shall be considered a "work for hire". The agreement's term is one year from the date of execution with automatic renewals thereafter. This agreement, which is apparently sent to all suppliers of photography, illustrations and other artwork by BHN, is one of the most blatant examples of non-negotiable, after-the-fact work for hire contracts.

The imposition of work for hire agreements after-the-fact is an abusive commercial practice and subverts the entire purpose of the requirement of a written agreement for certain categories of commissioned works.

As explained below, S.1253 would eliminate this practice by requiring commissioning parties to secure the creator's written consent to a work for hire arrangement before commencement of the work.

3. "Blanket" Work For Hire Agreements Are Common

"Blanket" work for hire agreements that apply to work beyond the scope of the particular project for which the freelancer is commissioned have proliferated. "Blanket" work for hire agreements impose work for hire status not only on the specific work commissioned but on all works created by the freelancer at any time for the commissioning party. Under such contracts, the freelance creator forfeits all rights in all future works created for the commissioning party, even though those works have not yet been assigned, negotiated or identified.

The work for hire contracts submitted as Attachment D to this statement contain numerous examples of this practice. Here is a sampling:

- In a letter to freelance photographers, Fairchild Publications requests from all freelance photographers "as per Copyright law" to sign an attached work for hire contract, to cover all future contracts. Not only was this statement deceptive in suggesting that the copyright law required the agreement to be signed, but the language of the agreement in fact went further than the letter indicated. It states that "all photographs taken by [the photographer] at any time for Fairchild Publications shall be deemed works for hire . . . under the copyright laws of the United States." (Emphasis added.) (See Attachment D-8). This agreement purports

to make all past and future images taken by the photographer works for hire -- all without the payment of any compensation.

- Home Box Office's contract with photographers states that "HBO may, from time to time, commission you to take photographs" and that "[a]ll photographs commissioned by HBO shall be considered 'work for hire' for HBO under the United States Copyright law as if HBO were the author of such photographs." (See Attachment D-13, paragraph 1).
- An agreement used by Anheuser-Busch states that "as a condition of your providing creative services . . . you agree that all creative works . . . shall be considered works made for hire." (See Attachment D-9).
- IBM uses a contract for "photographic services" which, in paragraph 1.0, states that all photography and all components thereof shall be works made for hire. (See Attachment D-10).
- USA Today's work for hire contract does not specify a particular project but covers "original stories and other work" created by the freelancer. (See Attachment D-7).
- Westinghouse Electric Corporation has used a "copyright release agreement" which covers all work product provided by the creator to Westinghouse and which

states that "such work product shall be considered as works for hire created for the benefit of Westinghouse." (See Attachment D-20).

- Apple Computer, Inc. uses a work for hire agreement which, as per Exhibit A to the agreement, may apply to all services rendered from time to time in connection with, for example, all phases of photography or all phases of graphic design. (See Attachment D-17).

Blanket work for hire agreements are completely unwarranted and, more importantly, deprive creators of the opportunity to negotiate separately for each project requested by the commissioning party. Requiring a freelancer to give away all rights to all work not yet commissioned or identified is simply an unfair business practice.

The drafters of the 1976 Copyright Act clearly intended that work for hire agreements be negotiated on a project-by-project basis. As discussed below, S.1253 codifies that intent and would render blanket work for hire agreements unenforceable.

4. The Enumerated Categories of Works Eligible for Work for Hire Agreements are Frequently Disregarded

Under Subsection (2) of Section 101, only works which fall into one of the nine enumerated categories of works may be the subject of written work for hire agreements. Despite this express limitation in the statute, work for hire agreements

covering work in categories other than those enumerated are common.

For example, Attachment D to this statement includes work for hire contracts covering photography (a category specifically excluded by the drafters of the Copyright Act),[16/] graphics and illustrations. Additionally, in many cases, work for hire

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16/ In its Reid decision, the Supreme Court went out of its way to note that "[a]n attempt to add 'photographic or other portrait[s]'...to the list of commissioned works eligible for work for hire status failed after the Register of Copyrights objected...." 109 S.Ct. 2176 n. 13. The Court quoted Barbara Ringer, then Register of Copyrights, for the reasons why the addition of photography was indefensible:

> "The addition of portraits to the list of commissioned works that can be made into 'works made for hire' by agreement of the parties is difficult to justify. Artists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law, and it seems clear that, like serious composers and choreographers, they were not intended to be treated as 'employees' under the carefully negotiated definition in section 101."

Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill, Chapter XI, pp. 12-13.

Despite the express exclusion of photography from the categories of works eligible for work for hire treatment, publishers and advertising agencies apparently believe that photography can qualify as a "contribution to a collective work," or as a "supplementary work". The legislative history of the evolution of the work for hire definition shows that this belief is without foundation. But the attempt to cover photography in work for hire agreements is yet another example of the lengths publishers will go to extend work for hire beyond its intended limits.

agreements do not describe the work and/or do not specify the purposes for which the work is being commissioned; thus there is no way of knowing whether the work fits within one of the enumerated categories eligible for work for hire status. Blanket work for hire agreements are a prime example of this practice. The fact that commissioning parties feel free to ignore the statutory restrictions on the types of work eligible for work for hire agreements supports further restrictions on the scope and use of work for hire agreements.

5. Commissioning Parties Have Consistently Attempted to Characterize Freelancer Creators as "Employees" for Copyright Purposes Only

Due to the absence of a definition of the term "employee" in subsection (1) of Section 101 of the 1976 Copyright Act, commissioning parties have consistently and zealously attempted to characterize freelance creators as "employees" for purposes of the work for hire provisions only. Of course, these putative "employees" receive none of the employment benefits conferred on formal, salaried employees.

Commissioning parties have seized upon the absence of a clear articulation in the statute of who an "employee" is and have forcefully argued in many court cases that persons who were in fact freelance creators were "employees" of the commissioning party because the commissioning party supervised and directed their work, or had the right to supervise and direct their work. See, e.g., Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548

(2d Cir.), cert. denied, 469 U.S. 982 (1984); Evans Newton Inc. v. Chicago Systems Software, 793 F.2d 889 (7th Cir.), cert. denied, 479 U.S. 949 (1986). This position, although at odds with the intent and structure of the work for hire provisions,[17/] led to confusion and disagreement in the courts and resulted in independent contractors being classified as "employees". Eventually, a freelance creator was successful in bringing this issue before the United States Supreme Court for resolution.

In Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166, 105 L.Ed. 2d 811 (1989), the U.S. Supreme Court rejected the position of publishers and other commissioning parties that any freelancer subject to their supervision and direction, or any freelancer whose work had to some degree been supervised or directed, should be considered their "employee" under the work for hire definition. The Court held that agency law principles should be applied to determine whether "employee" status exists. The Supreme Court's adoption of the agency law test, however, was based upon the absence of a legislative definition of the term "employee" in the 1976 Copyright Act.

The "employee" prong of the work for hire provisions should be clarified to reflect the original intent of its drafters -- that only formal, salaried employees should be classified as

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17/ A discussion of the intent of the drafters of the work for hire provisions is set forth below, in Section VI(A) of this statement.

employees who forfeit their authorship and copyright rights under the work for hire presumption.[18/] Not only would this "bright-line" test effectuate Congress' original intent, but it is preferable to the agency law test for several reasons.

Under the agency law test, it cannot be predicted with certainty whether a particular person will be considered an employee. Although the agency law factors outlined in Reid will, in many cases, likely result in a finding that a freelancer is not an employee, that conclusion is by no means certain. The agency law standards must be applied after-the-fact and lack the predictability needed to avoid constant recourse to the courts to determine whether employee status exists. An objective standard for distinguishing between employees and freelance creators who operate as independent contractors provides predictability and clarity to an otherwise uncertain relationship between the parties, and will provide clear guidance to the courts in ambiguous situations.

Moreover, the indefensible position taken by the publishers and other corporations[19/] in the Reid case demonstrates that

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18/ It should be noted that the Copyright Office supported the "formal, salaried" interpretation in its brief filed with the Supreme Court in Reid.

19/ Attachment E to this statement is a list of the corporations that, in the Reid case, supported the position that freelancers subject to a commissioning party's supervision and direction, or freelancers whose work had to some degree been supervised or directed, should be considered its "employee".

without a clear, objective standard, those companies are willing to assert any argument, no matter how contrary to the language and intent of the statute, to bring independent contractors within the definition of "employee". Given the lengths to which publishers and other commissioning parties have gone to characterize freelance creators as "employees", a clear, objective standard is vital to ensure that freelances do not become embroiled in future litigation which they cannot afford. The "bright line" test will preclude commissioning parties from further attempts to impose the fiction of "employee" status on independent contractors in order to obtain all authorship and copyright rights in their works.

VI. S.1253 Proposes a Moderate and Sensible Step Forward in Preventing Work for Hire Abuses and Clarifies the Intent of the Drafters of the 1976 Copyright Act

The amendments proposed by S.1253 will clarify the work for hire provisions to reflect the intent of the drafters and will give creators more meaningful opportunities to negotiate work for hire agreements with commissioning parties. The changes proposed by S.1253 are moderate and straightforward. They are intended to provide clear guidelines for the parties involved with commissioned works and to prevent the most insidious work for hire abuses.

The legislation is intended to infuse a degree of fairness into the negotiating positions of the freelancer and the party that commissions the work. As the foregoing discussion

illustrates, creators are often coerced into giving up all rights in their works, through a variety of tactics, without receiving just compensation for them, and have no real opportunity to negotiate a fair price for the rights the publisher or commissioning party really needs. The vast majority of freelance creators are willing to sell to the commissioning party whatever rights it needs, for a fair price. But creators should not be deprived of any meaningful opportunity to negotiate over those rights. S.1253 represents an attempt to restore creators' ability to negotiate over the transfer of rights.

A. S.1253 Gives Effect To The Intent of The Drafters of The Work For Hire Provisions

S.1253 would effectuate the original intent of the drafters of the work for hire provisions. The legislative history of the 1976 definition of work for hire demonstrates that commissioned works created outside the traditional, formal employment relationship were intended to qualify as works for hire only if the criteria set forth in subsection (2) were satisfied. It is also clear that the requirement in subsection (2) of a written work for hire agreement was intended to give creators an opportunity to make an objective, independent decision whether to enter into a work for hire arrangement before the commissioned work was commenced.

1. 1963 Preliminary Draft Bill

The 1976 Copyright Act completely revised the Copyright Act of 1909. It represented the culmination of years of study by the Copyright Office and was the result of many congressional attempts to revise an antiquated statute.

During the 1950's Congress appropriated funds for the Copyright Office to undertake a comprehensive program of research and study designed to produce draft legislation. The conclusions of this study were set forth in the 1961 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law. In that report, the Register proposed to confine the work for hire doctrine to the traditional employment context that Congress intended when it codified work for hire in the 1909 Act. The report proposed that, instead of the phrase "works made for hire" (which appeared in the 1909 Act), the new law adopt the more precise term "works created by an employee within the regular scope of employment."20/

That recommendation was translated into legislative language in the 1963 preliminary draft bill prepared by the Copyright Office. The 1963 draft bill defined work for hire as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or

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20/ Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. 88 (Comm. Print, 1961).

commission". The intent of the bill was plain: only works created by salaried employees would qualify as works for hire. This meaning of "employee" was clearly understood by the American Book Publishers Council and the American Textbook Publishers Institute: "[w]orks for hire - in which copyright is by law owned by the employer - would be redefined to include only work done by a salaried employee in the scope of his regular duties, and would exclude works made on special order or commission."21/

2. 1964 Revisions

The publishing and motion picture industries were concerned about the exclusion of commissioned works as works made for hire and objected that commissioning parties should be able to claim copyright for works ordered as parts of enclyclopedias, dictionaries, and motion pictures. They were particularly wary of the termination provisions in the bill, which would allow the author to terminate any grant of copyright rights after thirty-five years, but which did not apply to works made for hire.

Compromise bills were crafted in 1964 to accomodate these concerns. They defined a work for hire as "a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered 'a work made for hire'."

21/ See Patry, Latman's The Copyright Law, (6th ed. 1986) at 120, n. 28.

However, this sweeping inclusion of commissioned works, conditioned only upon a writing requirement, inspired fierce opposition from authors who felt that the requirement would not prevent publishers from using their superior bargaining position to force writers to sign work for hire agreements, thereby relinquishing all their copyright rights, as a condition for getting their books published.

3. 1965 Compromise

The dispute between authors and publishers was settled in 1965 in a historic compromise which was ultimately incorporated in the 1976 statute.[22/] The compromise entailed resolution of two issues. The publishers agreed to the termination provision which allowed authors of works other than works for hire to terminate copyright transfers after thirty-five years. In exchange, creators' groups allowed work for hire designation for works "specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture, as a translation, or as a supplementary work if the parties expressly agree in writing that the work shall be considered a work made for hire."

The Copyright Office's Supplementary Report underscored the understanding that the explicit enumeration of four categories of

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22/ The compromise is outlined in a joint memorandum submitted to Congress and the Copyright Office. See Copyright Law Revision: Hearings on H.R. 4347 et al. before the Sub. Comm. on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Comm., 89th Cong. 1st Sess. 134 (1965).

commissioned works as potential works for hire meant that no other kinds of ordered or commissioned works were eligible for such treatment.[23/] Although subsequent negotiations resulted in the addition of compilations, instructional texts, and atlases to the eligible categories, the careful scrutiny and debate concerning the addition of each of these categories demonstrates that the enumerated categories were to be the only exceptions to the general exclusion of commissioned works from work for hire treatment. For instance, the addition of photographic works to the eligible work for hire categories was considered and rejected after the Register of Copyrights objected strenuously that artists and photographers were among the most vulnerable creators and were "not intended to be treated as 'employees' under the carefully negotiated definition [of work for hire] in section 101."[24/]

Further, with respect to the writing requirement of subsection (2), the drafters of the compromise viewed as implicit in that provision the requirement that a work for hire agreement be signed before commencement of the work. It was understood

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23/ See Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, House Comm. Print, 89th Cong., 1st Sess. 67 (1965).

24/ Patry, Latman's The Copyright Law (6th ed. 1986), at 122, citing, Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill, Ch. XI at 12-13 (drafted 1975).

that work is not created "on special order or commission" under subsection (2) unless the contract itself is signed before initiation of the project.25/

This background clearly shows that Congress intended that "employee" works for hire under clause (1) of the definition would consist only of works created by salaried employees. Under the terms of the compromise, clause (2) was intended to establish by statute the only circumstances in which certain types of works created on commission by independent contractors or other "nonregular" employees qualified as works for hire. The legislative history also shows that the writing requirement in subsection (2) was intended to provide creators with an opportunity to make an objective, independent decision whether to agree to a work for hire arrangement for each commissioned work, before work on the project was commenced. S.1253 would clarify and give effect to Congress' original intent.

25/ See Copyright Law Revision, Part 5, 1964 Revision Bill with Discussion and Comments, 89th Cong., 1st Sess. 145 (Comm. Print 1965) (Statement by B. Ringer). It was also intended that work for hire agreements be negotiated on a project-by-project basis. The language of Section 101 refers uniformly to "a work made for hire" and casts the specifications for the writing requirement in the singular. Subsection (2) provides that a work falling within one of the enumerated categories may be considered a work for hire if the parties agree in writing that "the work shall be considered a work made for hire." The legislative history indicates that the drafters never contemplated the use of a written agreement covering more than one work, or all future works, of a creator.

B. S.1253 Clarifies The Definition Of "Employee" To Effectuate The Intent Of The Drafters Of The 1976 Act

The bill inserts the words "formal salaried" before the existing statutory term "employee" under subsection (1) of Section 101 of the Copyright Act. The purpose of the new clarifying language is to provide guidance to the parties and to the courts, and to ensure that only true employees will forfeit their authorship and copyright rights under the work for hire presumption. The new language thus codifies the intent of the framers of the compromise on work for hire enacted as part of the 1976 Copyright Act -- that the term "employee" in subsection (1) be limited to only those persons who have an established, ongoing relationship with an employer characterized by the provision of employment benefits to the employee.

As discussed above, the agency law approach embraced by the Supreme Court in the Reid case was adopted in the absence of any clear definition of the term "employee" in the 1976 Copyright Act. The new bill cures this deficiency and codifies the definition that was intended. Furthermore, in contrast to the agency law approach, the bright-line test proposed by the bill provides a clear, objective standard which allows persons to predict in advance whether they are "employees" under the statute.

The argument put forth by various publishers and other entities in opposition to this revision -- that the proposed

definition of employee was rejected by the Supreme Court -- has no merit. The Supreme Court imposed the agency test in the absence of any congressional definition of that term. The proposed revision will supply the definition that the Court found was lacking, thus leaving no doubt as to Congress' original intent.

C. S.1253 Would Make Clear That Subsections (1) and (2) Of Section 101 Are Mutually Exclusive

The bill would add the phrase "other than a specially ordered or commissioned work" after the introductory words "a work" in subsection (1). The purpose of this language is to make clear that subsection (1) dealing with employees, and subsection (2) dealing with specially ordered or commissioned works, are mutually exclusive. If a work is specially ordered or commissioned, subsection (2) is the exclusive standard governing whether the work is eligible to be a work for hire.

The clarifying language proposed by the bill codifies the holding of the United States Supreme Court on this point. In the Reid case, the Court specifically held that "[t]he structure of §101 indicates that a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors...." 109 S.Ct. at 2174. S.1253 would make clear that only if a work is not specially ordered or commissioned is it eligible to be an "employee" work for hire under subsection (1). This was the clear intent of the drafters of the work for hire provisions.

D. S.1253 Would Prevent The Use of Work For Hire Agreements After-The-Fact

The bill would require work for hire agreements to be signed before commencement of the work so that freelancers are not placed in the position of being coerced into signing work for hire agreements imposed on them after-the-fact. This abusive practice, discussed in detail above, forecloses any meaningful opportunity for freelancers to decide whether to enter into a work for hire arrangement and to negotiate the terms of agreements with commissioning parties. In addition, it subverts the whole purpose of the writing requirement of subsection (2), which is to allow creators to make a free and independent decision whether to agree to a work for hire arrangement.

The proposed language, which would render unenforceable and invalid any work for hire agreement imposed after-the-fact, adds an element of basic fairness to the negotiating positions of the parties and formalizes the intent of the drafters of the compromise on the work for hire provisions. It would require the commissioning party to present work for hire terms to the freelancer up-front, at the beginning of the parties' relationship.

The objection to this amendment voiced by various publishers -- that a prior writing requirement is burdensome and impractical -- is unpersuasive. The proposed language merely clarifies the intent of the drafters of the 1976 Act, which was

to afford creators an opportunity to make an independent, objective decision whether to agree to a work for hire arrangement. The use of after-the-fact work for hire agreements compromises the creator's independence and objectivity and precludes that opportunity. In addition, requiring commissioning parties to present work for hire terms at the outset is simply a fair commercial practice and is essential to restore parity to the bargaining process between commissioning party and creator. The use of after-the-fact work for hire agreements is a form of coercion which should not be sanctioned by the copyright laws. The commissioning party should have the burden of obtaining the creator's consent to relinquishment of his rights before the work is commenced.

Finally, in the event a commissioning party neglects to, or is unable to, obtain a signed written work for hire agreement from the creator before commencement of the work, that party is not without recourse. The commissioning party may, at any time, obtain an assignment of rights from the creator in accordance with Section 204(a) of the Copyright Act. Thus, the commissioning party may obtain the rights it needs, after negotiation with the creator, in the form of an assignment.

E. S.1253 Would Bar The Use Of "Blanket" Work for Hire Agreements

The bill would require that work for hire agreements be entered into "with respect to each such [specially ordered or

commissioned] work," thereby barring the use of "blanket" work for hire agreements. As discussed above, under "blanket" work for hire agreements, the freelance creator forfeits all rights in all works created for the commissioning party in the future. The use of blanket agreements robs the creator of the opportunity to protect his rights in each commissioned project, thus nullifying the purpose of the writing requirement in subsection (2). The bill's proposed language makes explicit the intent of the drafters of the 1976 Copyright Act that work for hire agreements be negotiated on a work-by-work basis. The amendment proposed by S.1253 would render "blanket" work for hire agreements unenforceable.

Opponents of the bill argue that requiring a separate written agreement for each commissioned work is burdensome and unworkable. That argument misses the mark. Of course it is much <u>easier</u> for commissioning parties to obtain only one agreement which covers all future works created by a freelance creator -- works which are not yet identified or even assigned -- than to separately negotiate for each work to be created. But the convenience of publishers is not a valid reason for further reducing the freelancer's ability to bargain over rights which are vital to his business and livelihood, particularly where the works in which those rights lie have not yet been created. Commissioning parties should bear the burden of securing a written work for hire agreement for each commissioned project if

they wish to obtain all authorship and copyright rights in a work.

F. S.1253 Would Make Complementary Changes to the Joint Work Provisions of the 1976 Copyright Act

Until recently, the controversy over the rights of freelance creators has arisen in the context of work for hire, which as noted above confers all rights of authorship and copyright on the employer or in certain circumstances on the party commissioning the freelancer's work. Recently, however, we have seen a disturbing new development that has arisen as a response to the unavailability of work for hire for certain types of works, or in response to situations in which either no written agreement exists or the creator has refused to sign a work for hire or all rights transfer agreement. That development is the after-the-fact assertion by publishers and other parties who commission freelance talent that the work is a "joint work" under the copyright laws.

This claim is usually a back-up defense to the work for hire argument; the commissioning party argues that if it does not own all rights under a work for hire theory, then that party has an undivided interest in the copyright because the work qualifies as a joint work under Section 101 of the Act. Not only does the joint work defense protect the commissioning party from liability for infringement (co-owners of the copyright cannot be held liable to each other for infringement), that defense also allows

the commissioning party to exercise independently all copyright rights without the consent or knowledge of the creator. Since publishers and other disseminators of copyrighted works have far greater ability to exercise profitably copyright rights than does the creator, the joint work defense gives the publisher all it needs to use the work as if it owned all rights to it. The only obligation the publisher has in that situation is to account to other co-owners of the copyright in the joint work -- which in practical terms may be of little benefit to creators ignorant of how the publisher is exercising copyright rights.

1. Experience Under the Current Definition

The great potential for abuse of the current joint work provision is illustrated by a recent case. In Community for Creative Non-Violence v. Reid, 109 S.Ct. 2166 (1989), CCNV at trial claimed ownership of the copyright in the sculpture in dispute based solely on the work for hire doctrine, and never claimed that the sculpture was a joint work. When Reid appealed the district court ruling that he was CCNV's "employee" under the definition of work for hire in the Act, CCNV argued for the first time that the sculpture should be considered a joint work if it did not qualify as a work for hire (as the Supreme Court later held it did not).

CCNV was able to make that argument in part because the definition of joint work is so vague; since the definition turns solely on the intention of the parties to create an inseparable

or interdependent whole, CCNV could easily allege that the requisite intent existed even though it had asserted all along that it was the sole owner of the copyright under its work for hire theory. Both the court of appeals and the Supreme Court resoundly rejected that theory, but the court of appeals remanded the case back to the district court to decide the joint work question. The artist must now defend against the joint work claim even though he succeeded, by a 9-0 vote in the Supreme Court, in defeating the only argument presented by CCNV at trial.[26/]

The point is that the definition of joint work is so subjective that it stands as an open invitation to litigants to make a joint work argument in any case in which more than one person had some involvement, no matter how minimal, with the work produced by the freelance artist. In the commissioned work context, some degree of involvement by the commissioning party

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26/ Another disturbing application of the joint work concept occurred in Strauss v. The Hearst Corporation, 1987-88 Copyright Law Decisions (CCH), ¶ 26,244 at 21,723 (S.D.N.Y. 1988). There a court suggested that a publisher's design of a layout for a commissioned photograph, its supervision of the actual shots taken by the photographer, and the retouching of certain photographs by "other artists and technicians" hired by the publisher contributed to the "inescapable conclusion" that the photograph was a joint work. This analysis, if adopted by other courts, would deprive photographers of their ability to control the dissemination of their own works. Moreover, the analysis would enable publishers to claim co-authorship of virtually every article, photograph, illustration or other visual work created by freelancers as a commission.

exists by definition in every case. A freelance photographer, for example, is always told what the client wants, and the client inevitably has the right to accept or reject the work. Under current law, the client can always make the argument, however specious it may be, that the parties intended to create an interdependent whole and thus that the final product of the photographer's work qualifies as a joint work. That argument should fail even under current law if the client does not contribute an original work of authorship to the project, but the lack of clear, objective criteria in the definition of joint work means that artists will frequently be forced to either litigate the issue or simply give in to the client's demands.27/

Unfortunately, the costs of litigation are such that the ambiguity in the definition will invariably work to the advantage of the larger, better-funded commissioning party. Most creators do not have the resources to fight with publishers or advertising agencies over whether the intent to create an interdependent whole existed, or whether a sufficient contribution of authorship was made by the commissioning party. As a result, creators will

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27/ Attachment F to this statement shows why that argument -- that a publisher's directions or suggestions to a creator are sufficient to make the publisher a joint author of the resulting work -- lacks any basis in reality. Attachment F demonstrates the tremendous variation and vitality of the creative vision of ten artists, all of whom were given the same assignment. The results are diverse and represent the unique creative talents of each artist.

often have to concede the joint work issue when it arises, thereby giving up rights for which they are not compensated and which are rightfully theirs.

2. The Amended Definition of Joint Work Would Provide Greater Certainty for the Public and Thus Would Prevent the Explosion of Litigation That Can be Expected Under Current Law

The proposed definition of joint work contained in S.1253 would not only clarify the existing ambiguity with respect to what constitutes a contribution of joint authorship, it would also provide a simple, objective standard for determining whether a work qualifies as a joint work. Under the bill, three criteria would have to be satisfied before a work could be considered to be a joint work. First, the bill would leave unchanged the current requirement that the authors of a joint work intend that "their contributions be merged if not inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (definition of "joint work"). Second, the bill would make explicit the requirement that each joint author make an "original" contribution to the work, thereby clarifying existing law to leave no doubt that any such contribution must be copyrightable. And third, the bill would require that, in addition to meeting the first two criteria, the parties to a specially ordered or commissioned work must sign a written agreement before the project begins specifically providing that the work shall be a joint work.

The addition of the second and third criteria are critically important to accomplishing the basic objectives of the bill, which are to provide clearer, more explicit guidance to the public and to courts so as to discourage the indiscriminate and unjustified assertion of joint work claims by publishers and other parties that commission freelance talent.

a. Intent Requirement

The current definition of joint work turns on whether the contributors to the work intended that their contributions be merged into a unitary whole. That intent must exist at the time the contribution is made, although the authors need not necessarily be working at the same time and at the same location.[28/] The determination whether the requisite intent exists is entirely a subjective one, and depends in large measure on the degree to which each contributor can demonstrate through his testimony that he intended his work to become part of a larger unitary whole.

The bill would not alter this intent requirement, but would supplement it with an objective standard (the writing requirement). Thus the bill would not disturb existing case law with respect to the intention to create a unitary whole.

28/ See, e.g., Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir.), modified, 140 F.2d 268 (2d Cir. 1944).

b. Originality Requirement

As one commentator has recently noted, "Section 101's definition of a joint work as a work prepared by two or more 'authors' implies that the contribution of each must be a copyrightable 'work of authorship' within the terms of Section 102(a)."[29/] In fact, many courts have followed this principle in holding that each joint author must contribute copyrightable subject matter in order for their combined efforts to produce a joint work. For example, the contribution of ideas or suggestions by a homeowner to an architect has been held to be insufficient to make the homeowner a joint author.[30/] Another court similarly held that a commissioning party's mere description of a design was not enough to enable that party to assert that the designer's work was a joint work.[31/]

Unfortunately, however, as the quotation from the commentator referenced above makes clear, the requirement that a joint author make a copyrightable contribution to the joint work is only implicit in the definition of that term. That lack of clarity has led other courts (and certainly litigants looking for

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29/ Goldstein, Copyright Principles, Law and Practice, Vol. 1, p. 379 (emphasis added).

30/ See Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co., 542 F. Supp. 252, 259 (D. Neb. 1982); Meltzer v. Zoller, 520 F. Supp. 847, 857 (D. N.J. 1981).

31/ See Kenbrooke Fabrics, Inc. v. Material Things, 223 U.S.P.Q. 1039, 1044-1045 (S.D.N.Y. 1984).

any opportunity to claim joint work status) to be less rigorous in requiring all joint authors to meet the minimal standards of authorship -- that is, contribute copyrightable subject matter.

The most notable example of this relaxed standard appears in the court of appeals opinion in the Reid case. There the D.C. Circuit Court of Appeals suggested that CCNV may be the joint author of Mr. Reid's sculpture because "Snyder and other CCNV members . . . monitored the progress of the work, not simply to approve Reid's embodiment of their idea, but to guide his expression and coordinate with his effort CCNV's construction of the steam grate pedestal."[32/] Moreover, the Court of Appeals cited the late Melville Nimmer's influential treatise as authority for the proposition that CCNV's choice of a title (Third World America) and legend ("And Still There Is No Room At The Inn") for the sculpture should count toward CCNV's alleged contribution of authorship to the work.[33/]

The suggestion that a publisher or other commissioning party can claim joint authorship status simply on the basis of providing ideas or guidance to the creator is at odds with the basic premises of our copyright system. No one should be able to claim the benefits accorded true authors without meeting the constitutional minimum of contributing copyrightable expression.

32/ See 846 F.2d 1485, 1497 (D.C. Cir. 1988).

33/ Id. at 1496.

To allow a commissioning party to claim joint authorship status without satisfying that basic requirement would deprive true authors of any meaningful protection under the Copyright Act. Publishers who commission freelancers would be able to claim (and undoubtedly will claim if law is not clarified) that the commissioned photograph or illustration is a joint work that the publisher can exploit without the permission or knowledge of the creator. If publishers were successful in this effort, no creator could bring an infringement suit against them because joint authors are insulated from liability for copyright infringement.

As the Court of Appeals acknowledged in the Reid case, "with the substantial cutback of the work for hire doctrine, more cases of this genre can be expected to appear under the joint authorship rubric."[34/] The definition of joint work should be clarified to forestall a repeat of the endless litigation that for the last 12 years tested the limits of the concept of "employee" under subsection (1) of the work for hire definition. What the bill proposes is to leave no doubt (and thus no room for argument in time-consuming and costly litigation) that a joint author can claim that status only by meeting the standards applicable to all authors under the Copyright Act.

34/ See 846 F.2d at 1497 n. 17.

c. Prior Writing Requirement

The most important change to the definition of joint work introduced by S. 1253 is the requirement that for specially ordered or commissioned works only, the parties must expressly agree in writing before commencement of the project that the fruits of their labors shall be considered a joint work. Before demonstrating why this proposed modification is absolutely essential to protect freelance creators and the courts from overreaching claims of joint work status, the terms of the proposal must be clearly understood.

The prior writing requirement was deliberately made applicable to specially ordered or commissioned works only. It is in that setting that the parties always have an opportunity (since one party is commissioning the other for a specific purpose) to discuss their respective rights. Simply because of the nature of the commissioning process, there is an obvious occasion for the parties to address whether the copyright will be owned by one or the other of them, or jointly.

Thus the bill would not require artists who collaborate on a project to satisfy the writing requirement. As long as one party is not commissioning the other, their combined work product would be considered a joint work under the bill if each intended to create a inseparable or interdependent part of a unitary whole, and if each party's contribution is copyrightable.35/

35/ That is not to say that joint work agreements would be inappropriate outside of the commissioned work context. As long

(Footnote cont'd)

It is important to recognize that the prior writing requirement would be one of three factors in deciding whether a specially ordered or commissioned work qualifies as a joint work under the bill. The parties to a commissioned work must first meet the intent and original contribution requirements applicable to all works that purport to meet the joint work standard; in addition, however, they must sign a written agreement before work begins. If the writing is not executed or if one party's contribution is not copyrightable, then the work is not a joint work. Any joint work agreement applicable to specially ordered or commissioned works would thus be invalid if one party's contribution were not copyrightable, such as merely giving suggestions or ideas to the creator. In short, the mere execution of an agreement could not "bootstrap" compliance with the other two prerequisites of joint work status under the bill.

The prior writing requirement is needed in part because of the deficiencies in the current "intent" test used to determine whether a work is a joint work. The only intent that is required under current law is that the parties intend to create a

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(Footnote cont'd from previous page)

as the contributing parties satisfy the intent and original contribution requirements, there would be no obstacle (as there is none under current law) to the parties' memorializing their understanding of joint work status in a written agreement. The bill would not preclude and is not meant to discourage such agreements outside of the commissioned work context; it simply would not mandate a writing in those situations.

interpendent or inseparable whole; it is irrelevent whether they actually intend to create a joint work, and thus to share ownership of the copyright with all the consequences that sharing entails. Indeed, the co-authors may have no idea who the other co-author is or what he is producing as long as each co-author intends his contribution, at the time it is created,[36/] to become an inseparable or interdependent part of a unitary whole. Given the far-reaching consequences of joint work status, it ought not to be created unknowingly and without express manifestation by the parties of their assent. That is what current law requires before a commissioned work can become a work for hire. It is also what current law requires as a condition of any transfer of copyright rights.[37/] The same rationale for the writing requirement in those contexts applies with equal force to the joint work setting.

By imposing an express writing requirement, the bill would force the commissioning party and the creator to decide at the outset of their relationship what the respective rights of each party will be. That discipline is both reasonable and desirable

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36/ See Copyright Law Revision, Report with Additional Views to Accompany S.22, 94th Cong., 2d Sess. at 120 (1976) (hereinafter House Rep.); Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., Copyright Law Revision Part 6, 89th Cong., 1st Sess. at 65 (House Comm. Print 1965).

37/ See 17 U.S.C. § 204(a).

from the standpoint of sound public policy and in the interest of preventing litigation that so often results from the absence of a written expression of the parties' understanding.

3. The Objections to the Addition of a Writing Requirement for Joint Works Are Conjectural and Fail to Give Due Consideration to the Need for an Objective Standard

The objections to the addition of a prior writing requirement fall into two categories. One category consists of objections that the bill would put an undue burden on commissioned parties to secure a written understanding of joint work status before work begins. The other category of objections focuses more on the potential burden on the courts that could result if the parties intended to create an interdependent and inseparable whole (and indeed do so) but fail to execute the necessary writing to make their efforts a joint work. Both categories of objections exaggerate the potential difficulties that the writing requirement would create, while at the same time overlook the benefits that would flow from establishment of a clear, objective standard.

As for the potential burden that the prior writing requirement would impose on commissioned parties, it is entirely appropriate that they bear that burden. To put it plainly, publishers and advertising agencies, which often commission freelance talent, should not be able to assert the joint work defense just because no written understanding exists. That is

what is happening in litigation involving copyright ownership of commissioned works, and it must be stopped. Commissioning parties know or should know at the time they hire the freelancer which rights they need to exploit the work; if they want to hedge their bets by maintaining an undivided interest in the entire copyright, then they should bear the burden of securing a written agreement so providing.

If the creator refuses to agree to that arrangement, he or she ought to be protected from the after-the-fact assertion by the publisher that the work is a joint work. One of the most telling reasons why this protection is necessary has to do with the nature of the property interest each co-author has in the joint work. Under current law that would remain unchanged if the bill were enacted, "co-owners of a copyright would be treated generally as tenants in common, with each co-owner having an independent right to use of [sic] license the use of a work, subject to a duty of accounting to the other co-owners for any profits."38/ Since each co-owner has the independent right to license others to use, distribute or otherwise exercise any or all copyright rights in the work, joint work status inevitably means a loss of control of the copyright to the co-owner that has the greater resources to exploit those rights. In most cases,

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38/ See House Rep. at 121. See also Oddo v. Ries, 743 F.2d 630 (9th Cir. 1984).

the party losing control is the creator, because he lacks the economic power of the publisher to negotiate a deal with other potential users or distributors. While it is true the co-owner/creator has the theoretical right to demand a share of the profits earned as a result of a licensing arrangement entered into between a co-owner/publisher and a large user or distributor, any market for the creator's own efforts to exercise his copyright rights is often effectively foreclosed. The end result of joint work status is to deprive the creator of the value of copyright rights because they are exploited instead by better-funded co-owners who usually do not bother (especially since they have no legal obligation to do so) to advise the creator of the deals that have been made, and to share the profits generated by them.39/

The other category of objections focuses upon the consequences for the courts of failure to execute, or to timely execute, joint work agreements for specially ordered or commissioned works. The concern is that courts will be put into a difficult position when putative joint authors fail to execute the required writing and a determination must be made of separate copyright ownership of each contribution. The response to this

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39/ Moreover, the co-owner/creator may suddenly find himself sharing copyright ownership with new co-owners who had no prior involvement with the joint work. Since co-owners are tenants in common with respect to copyright ownership, a publisher/co-owner can sell its entire undivided interest in the copyright to a third party without the co-owner/creator's knowledge or consent.

concern is threefold. First, the problem will only surface when in fact an inseparable (as distinguished from an interdependent) whole is created. In many cases, such as songwriting when a composer contributes the music and someone else the lyrics, a court will readily be able to sort out the interdependent contributions made by each party so as to assign a separate copyright interest to each.

Second, in the rare case in which two contributing authors fail to sign a written agreement and produce a truly inseparable whole, courts will have to make a determination, based on drafts of each party's original contributions or other available evidence, what each party created. While it may be impossible to make that determination by looking only at the finished product, it is unreasonable to assume that is all the court will have before it. The recollections of the contributors and other witnesses, copies of original versions of the contributions or other records kept by the parties, and an evaluation of the different skills of the parties (a painter's contribution to an alleged joint work will no doubt be quite different than that of a photographer to that same work) will all come into play when a trial court is faced with the difficult but not impossible task of determining what each contributor owns.

Finally, the objection to the difficulties judges may encounter when the writing requirement is not satisfied fails to give due weight to the benefits certain to be gained from

imposing that requirement. With an objective standard in place, creators will have an opportunity to decide up front whether sharing co-authorship status with another party is acceptable. If the freelancer decides that such an arrangment is undesirable, he will not have to revisit that question later on when the commissioning party makes a belated attempt to claim that the product of the freelancer's labors is a joint work. Equally as important, the introduction of an objective standard will relieve the courts from the burden of determining the merits of joint work claims in virtually every case that involves a collaborative effort by two or more people. Finally, absent a clarification of the joint work definition, that seemingless innocuous concept will be used to eviscerate the protections afforded creators under the Act.

VII. Conclusion

In sum, S.1253 proposes a sensible and responsible step forward in preventing work for hire abuses. On behalf of ASMP and the CJC, I strongly urge the Subcommittee to take favorable action on this important bill.

Attachment A

THE COPYRIGHT JUSTICE COALITION

Advertising Photographers of America

Advertising Photographers of America/Atlanta

Advertising Photographers of America/Chicago

Advertising Photographers of America/Detroit

Advertising Photographers of America/Los Angeles

Advertising Photographers of America/Miami

Advertising Photographers of America/New York

Advertising Photographers of America/San Francisco

Albany Writers Guild

American Federation of Teachers, AFL-CIO

American Federation of Television and Radio Artists

American Society of Journalists and Authors

American Society of Magazine Photographers

Art Directors Club (of New York)

Art Directors Club of Metropolitan Washington

Artists in Print

Association of Medical Illustrators

Authors Guild

Aviation/Space Writers Association

Boating Writers International

Boston Visual Artists Union

Chicago Women in Publishing

Committee of Interns and Residents

Council of Writers Organizations

Dance Critics Association

Editorial Freelancers Association

Foundation for the Community of Artists

Graphic Artists Guild

Illustrators Club, The

Independent Writers of Chicago

International Motor Press Association

Midwest Travel Writers Association

Mystery Writers of America

National Artists Equity Association

National Association of Science Writers

National Book Critics Circle

National Cartoonists Society

National Writers Club

National Writers Union

Outdoor Writers Association of America

Pen American Center

Philadelphia Writers Organization

Romance Writers of America

Science Fiction Writers of America

Screen Actors Guild

Society of American Travel Writers

Society of Authors' Representatives

Society of Illustrators

Society of Stage Directors and Choreographers

Songwriters Guild of America

St. Louis Writers Guild

Travel Journalists Guild

United States Ski Writers Association

Visual Artists and Galleries Association

Visual Artists Association

Washington Independent Writers

Writers Guild of America, East

Writers Watch

Attachment B

STATEMENT OF JERRY ANTON
MEMBER, GRAPHIC ARTISTS GUILD
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman,

My name is Jerry Anton. I have been representing artists and photographers for many years and have had a successful business, with little difficulty negotiating contracts until the issue of work for hire started to come up.

Recently, I encountered several situations with publishers and advertising agencies making a demand for work for hire. Some waited until the job was completed before exerting work-for-hire pressure.

The most blatant abuse of our rights came from one of the Conde Nast publications, who made it perfectly clear that no work would be awarded unless a work-for-hire contract was signed in advance. My refusal to sign resulted in no work from that company.

As long as the company policy of publishers and advertising agencies requires work for hire, there will continue to be a severe dislocation in the normal transaction of business in buying and selling creative works.

Prior to the change in the Copyright Law everything seemed to be above board between the commissioners and their freelance creators. However, the provision of work for hire in the new law seemed to give publishers and agencies the excuse to manage, manipulate and cheat artists and photographers out of their fees and rights of ownership.

Unless the Copyright Law is amended to restore a fair and equal bargaining position between commissioners and creators, this chaos will continue to disrupt the creative marketplace.

Freelancers are <u>not</u> work-for-hire employees, but this new law has given the commissioners the opportunity to treat them as such, without the benefits and respect they would normally give to their own employees.

STATEMENT OF REAGAN BRADSHAW
MEMBER, AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman,

My name is Reagan Bradshaw. I am a photographer and member of the American Society of Magazine Photographers.

I once had a wonderful job as staff photographer for a monthly magazine. I was given a seemingly unlimited budget for travel within the state, all the Kodachrome I could shoot, all the latest Nikon cameras and lenses, and complete freedom within the editorial purview of the magazine, which was the Texas outdoors - landscapes, parks, fish, wildlife and outdoor sports. I was paid a decent salary, my employer contributed jointly with me to a retirement fund, social security, and to a life and health insurance plan. I was given sick leave, had workmen's compensation benefits, vacation time, periodic pay raises, had office and studio space, all the usual employment benefits.

The job was a wonderful experience, and I did some of my best work there, but after a few years I began to grow dissatisfied. I was pouring my time, my energy, my soul into the creation of those photographs, and they belonged to my employer. That was part and parcel of being an employee, and in return for that, I received all the above benefits. But it was not enough for me. I quit the job to freelance, began to build a business for myself, to acquire my own equipment, rent my own studio space, buy my own health insurance, pay my own self-employment tax, health and life insurance, IRA contributions, disability insurance, save for retirement, unexpected illness, and all the contingencies that being in business requires.

It was many years before I could put together anywhere near all the equipment, facilities and benefits that I had had in the job with the magazine. But I did have one thing that I lacked in that job - ownership and control of my own work.

Performing as an independent contractor to a client to produce specific work for specific usage, I could do what I wanted with that work after the client's needs were fully taken care of. I have been able to sell photography as stock, generate magazine stories, exhibits, even books from my past work without asking anyone's permission to use it. My gratification as an independent photographer is in creating and controlling a body of work that grows incrementally as I grow as an artist and that records and defines my life as a photographer.

Now a strange thing is happening. After over fourteen years of building a business and creating and defining a body of work, a stock file for myself and a legacy for my family, I am being asked by clients to sign contracts to perform something called "work for hire," presumably provided for by the Copyright Law of 1976.

The interesting thing about work for hire is that for the purposes of the copyright ownership, it makes me an employee of the client, meaning that he is the creator and the owner of the work. So, I am back where I was with the magazine job, right? Wrong! Under work for hire it is only for the purposes of copyright that I am an employee. For all other purposes I am an independent contractor, meaning the client has none of the usual obligations of an employer to an employee. Meaning I get to take all the risks and bear all the expenses of being in business, get to pay for all my own benefits, fund my own insurance, retirement, etc., and the client gets ownership of the work. It's the worst of both worlds and a subversion of the original intent of Congress to award ownership to the creator.

Well, the deal was not good enough when I was a bona fide employee, and it is certainly not good enough under the perversion of work for hire. The great satisfaction of an artist is in the creation and control of his life's work. And control means copyright ownership. Without that ownership, we do not have a body of work to sculpt and husband throughout our careers. We have only today's shoot and the hope of another shoot tomorrow until we're too old or too tired or too discouraged to keep shooting.

STATEMENT OF HERBERT BRAMMEIER, JR.
MEMBER, GRAPHIC ARTISTS GUILD
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman,

My name is Herbert Brammeier, Jr. I have been a freelance cartoonist for over 30 years, my work has appeared in many newspapers, magazines and anthologies. I am a member of the Graphic Artists Guild.

Occasionally the Reader's Digest has requested my permission to reprint cartoons, a consent I was most happy to grant to this fine magazine. But in November 1983, it came as a surprise to find one of my cartoons in a Reader's Digest ensemble entitled, "Pajama Games," no similar request (for reprint permission) having been received by me prior to this use. I had sold that cartoon to Saturday Evening Post in 1959 under its well-known policy of one-time use only. That policy was confirmed, as always, by prompt return of the original artwork upon publication. I have that original drawing in my possession.

The Saturday Evening Post had been purchased by another publisher many years after 1959 and instituted a work-for-hire policy that somehow is construed to include everything that has ever appeared in that magazine's long and illustrious history. The magazine must have received the customary request from Reader's Digest and proceeded to act as though it held title to my cartoon.

I cannot find this construction to be acceptable, and so told the publisher in a letter. There has been no reply. What happened to me is illegal. But it happens all the time, every day, to artists under the sanction of the law.

This loss of a transaction rightfully mine comes about, I believe, as one of the many direct results of a work-for-hire policy that is unfair to contributors to publications and detrimental to their welfare. If it is considered that all works appearing in the Saturday Evening Post are forfeited for all time by their originators, the body of material must be in startling proportions. There is a delicious irony in this since the Saturday Evening Post today seems to find comfort in the glow of the Norman Rockwell image of an America in which mutual trust and support are the hearthstones.

Today I do not release my work to any user requiring consent to work for hire. In principle and in practice it is an outrageous stipulation. But younger artists struggling to build a career in such a highly competitive field may not be in a position to enjoy this option. Under the duress of necessity they may find themselves obliged to forego any say in the future disposition of their efforts.

Memory does not tell me that this work-for-hire condition was a major problem when I started in this business. I see no reason whatsoever for this practice to continue. Our work should be considered our own property without variances. The law should reflect this fact.

Statement of Alan Brown
Member, American Society of Magazine Photographers
In Support of S.1253
Before the Subcommittee on Patents, Copyrights, and Trademarks

Mr. Chairman, My name is Alan Brown. I am a professional photographer, living in Cincinnati, and I have had some unpleasant experiences lately with work for hire offered by ad agencies and corporations.

The Sive Agency, which is Young & Rubicam in Cincinnati, sent me a purchase order with a work-for-hire clause. I had worked for this agency before and it had not been an issue, so I crossed out the clause. Although I negotiated for specific usage for the photo- one time rights for a ten second spot, I found out that my picture had been used for five different types of commercials, with no extra payment to me. They were acting as if they had a work for hire contract with me.

Another time, I negotiated for a specific publishing use of a photo with Sive and learned through hearsay that they were planning to use the photo for ten additional magazine placements. Upon hearing about the additional uses, I asked the agency what they were planning to use my photos for. They called me into a meeting with the account executive, the creative director and the production manager.

The account executive wanted to know why it was important for me to know about the additional magazine uses. The production manager told me that he disagreed with photographer's rights. He said it was a bunch of garbage, even though it is the law. The production manager didn't want to discuss the copyright law - he only said that he disagreed and didn't need my grief. The whole experience was intimidating and frustrating. First, they misrepresented the number of magazine uses my photographs were being commissioned for and then this whole group was bearing down on me as if I were going to gouge them. Indeed, the production manager told me later that if I insisted on following the current copyright law, they didn't need to use me, they'd find someone else. Needless to say, I didn't get any business from them again.

About two years ago, we realized that refusing to do work for hire was costing us business. Since then, we've seen more and more work for hire demands from clients.

In Cincinnati, ad agencies are tied in with the 4A's, an advertising association. The 4A's have sent newsletters and memos to their members about this "insidious" copyright law and how to avoid it with work for hire.

Work for hire is counterproductive to good business. It takes away the photographer's right to negotiate. If I am considered an "employee" of the company, I'd like to get the benefits.

STATEMENT OF JIM CARSON
MEMBER, GRAPHIC ARTISTS GUILD
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman,

My name is Jim Carson. I am an illustrator and teacher and work primarily in advertising and editorial markets.

In early 1982 I received a call from International Education, a company that supplies design and art to textbook publishing houses. In this case, the client was Fawcett in Chicago. The publisher had asked that all the work be done under a work-for-hire contract arrangement. I found this out after having discussed the job and price, and even agreeing that I would sell them all rights. I was then asked to sign a work-for-hire contract.

I told the art director that I would not sign it, even though I was willing to sell all the rights they needed. The price would have been reasonable for first-time use, not great for all rights, but I told her that I'd like to do the job and so I'd go the extra mile and sell the rights and even let them have the original art.

But signing away the "creatorship" was for me a moral and ethical issue. Even though I was willing to bend and sell them all the rights they needed, they still said they needed my signature on the work-for-hire contract.

I decided not to do it. I feel it is denigrating to work for hire. I lost the job, and of course, lost the money I would have received.

If I worked more in publishing, I'm sure I would feel more pressure to take work for hire. I feel it is immoral to have to give up your right to say that you are the creator. If you allow publishers to buy up your stock of illustrations, it can put you out of business. They can end up owning a complete file of illustraitons and they don't have to go back to you.

Artists should look upon work for hire as an unfair business practice.

STATEMENT OF JAMES COOK
MEMBER, AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman,

My name is James Cook and I am a professional photographer. I have worked in most aspects of the trade, from corporate and editorial to photojournalism, public relations, industrial and portraiture.

Work for hire has made a significant dent in my stock business. I make from one-third to one-half of my income from resale of photos. If I have to give up all rights, I'm losing my stock sales. My brother owns a stock agency and he is aware that the amount of stock is shrinking because of work for hire.

The majority of photographers don't even understand what they are giving up. If they even use work for hire photos in their portfolios, they are copyright infringers. Many photographers are becoming unified over this issue; many are leaving the business.

Creators have long held the ownership of their work. Publishers and agencies have always paid by usage. It was the foundation of the copyright law. This work-for-hire provision is changing all of that. The net effect on the industry is that it is harder to make a living. Some are going out of business. The talent pool is shrinking and the photo buyer is losing his ability to get the best for the money. If you have to compete with the cheapest, you won't give it your best shot.

I am now looking around at other fields of work. I'm not convinced there is a future in photography.

Statement of D.L. Cramer
Member, Graphic Artists Guild
In Support of S.1253
Before the Subcommittee on Patents, Copyrights, and Trademarks

Mr. Chairman, my name is D. L. Cramer. I am a medical illustrator with over 20 years of experience. During the last couple of years I have been offered nothing but work-for-hire contracts by textbook publishers. One experience in recent years involved Holt, Rinehart, Winston.

I had taken an assignment from them to do some illustrations for an anatomy textbook for children. The pay was not exceptional - $1,900 for two to three illustrations. As the assignment was a rush job, I had almost completed the work when a four-page work-for-hire contract arrived in the mail. It was a printed standard form entitled, "Independent Consultant Agreement."

During 1983 I embarked upon what turned out to be a year of fruitless negotiations with Grune and Stratton, Inc. involving a work-for-hire contract. I had been asked by a doctor with whom I had a good working relationship to do the illustrations for an obstetrical-gynecological surgery textbook to be published by Grune and Stratton. I received a form in the mail from the publisher that was a work-for-hire contract. I said I couldn't sign it.

I received a call from a lawyer from Grune and Stratton. During the discussion with the lawyer, I offered to negotiate to sell some individual rights to them, such as foreign publication rights or other specific rights they needed. I asked her whether, in fact, Grune and Stratton needed to have movie rights and T-shirt reproduction rights for ob/gyn illustrations, as under work-for-hire, they would retain these rights and more.

I insisted that I retain ownership of the work and that it would have to be returned to me. The lawyer was intractable. It was work for hire or no job. I had to write back to the doctor telling him that if lawyers were taking over the publishing business, the lawyers would have to illustrate the book (if they could get lawyers to sign such a contract) because I couldn't do it.

That was the end of the project. I lost the estimated $10,000 to $15,000 I would have received for the book and the good working relationship I had developed with the doctor involved ended.

Another recent example is a textbook publisher in the midwest that sent me some work to do in a big rush, along with a work-for-hire contract. I contacted them to say that I could not do work for hire. They refused to negotiate the terms and fired me from the assignment by leaving a message on my phone machine. This was a job that would have paid $5,000-$6,000.

It has come to the point that even with my 20 years of experience, I may have to decide that I can no longer do the work I was trained to do. Since 1983 just about every contract I have been offered in textbook publishing has been work for hire. I had to send back four or five such contracts in 1983/1984 alone. It's either work for hire or no work at all, and there is little chance to negotiate any other kind of contract.

A good anatomy textbook is about 50 percent illustrations. Under work for hire, the publishers become authors of the work by law. They can alter the artwork, paint over it, rearrange it, use it again and again.

It's more than a question of financial compensation - the integrity of my work is at stake. People have a right to expect a certain quality of work from me. I am not unknown in my field. I am Director of Anatomy Labs at New York University. I have a Masters Degree from the John Hopkins School of Medicine, Department of Arts as Applied to Medicine, and a Ph.D. from the University of Chicago. I prefer to do the kind of functional medical illustrations I was trained for and it would be heartbreaking to have to leave this business. But the business is leaving me.

I have fought against work for hire since the beginning. It is not just young people starting out who are being affected by this law. It is all of us.

Statement of Tom Daly
Member, Graphic Artists Guild
In Support of S.1253
Before the Subcommittee on Patents, Copyrights and Trademarks

Mr. Chairman, my name is Tom Daly and I've been victimized by work for hire.

I am a member of the Graphic Artists Guild and have worked as a freelance illustrator for over 23 years, mostly for advertising agencies. Recently I also did some work for a textbook publisher and encountered a particularly infuriating case of work for hire.

Work for hire threatens both my economic survival and the integrity of my creative work. Publishers don't expect much, only everything, without a word of any additional payment. Their ethics are negligible. I'm surprised they don't ask you to leave your leg at the door on your way out of the office. Let me tell you what happened to me.

A year ago I was contacted by Hartcourt Brace Jovanovich to do some illustrations for a French textbook. The pay was low - $350 for two black and white illustrations. But I accepted the work because I was interested in doing more day-to-day kinds of illustrations rather than the ritzier images of ad work.

Never having worked for a textbook publisher before, I assumed the best.

I started the work and pressed the art director for a contract. She was very nice and sympathetic, but told me she needed four different signatures on the contract and someone was always out of town. Everything was disorganized, she said, because the company was moving to Florida.

I was stunned by the contract (when I finally received it). They wanted everything and didn't say a word about it upfront.

I immediately went to the office with my completed illustrations and took out a red pen and started crossing out sentences in the contract in front of the art director. She got very upset and said, "Please don't do that. You'll make my life difficult and it's already difficult enough."

I told her it was difficult for me too. "You people want everything, and you're giving me nothing," I told her. "It's too one sided. I'm not even making expenses here."

I felt like I had been dropped into a sweatshop in the middle of the grament center or caught in a time warp and transported to the 1930's. I was trapped. I had finished the work, had no one else to sell it to, and the contract was not negotiable.

The art director said the company was extremely pleased with my work and though she said she thought it was unfair, work for hire was company policy and that was that.

I had no choice but to accept their terms. At least I got my original artwork back eventually, thanks to the art director. She used to whisper to me over the phone about that because it was against company policy. I couldn't believe it. It was like being in Russia with the secret police listening in.

It is very important for me to get back my original work. I reuse originals to get more jobs by publishing them in talent directories that buyers use to find artists. I get a much higher quality image when I print the original instead of a reproduction. It's professional suicide for me to sell for a few hundred dollars, a work that could bring in thousands of dollars of new business.

I don't do this work for fun. I'd rather be out playing ball. Illustration is work, and it's work in a very competitive industry. I'm good at what I do and I deserve to get a fair shake for my labor.

I make about $27,000 to $30,000 a year, but some years I have made only $20,000 because I turned down work for hire. I just can't work under those kinds of conditions. I have deliberately arranged my life so I can usually afford to walk away from work for hire. I have no family to support and I live simply. Other artists can't do that.

What was a loophole in the Copyright Law has turned into a whole world of trouble for artists. Work for hire has become the standard form of more and more contracts. Publishers are set in their ways. Their philosophy is, take everything, pay nothing. They're not going to let go of work for hire until they have to - until the law is changed. Sometimes I feel like a pencil or a brush in the hands of these companies. But I count too. I have a soul, I have needs. I have to make a living, I have rights to my own work.

Please change the law to help us. Help us keep what is ours.

STATEMENT OF TERI GILMAN
MEMBER, AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman,

My name is Teri Gilman and I am a member of the American Society of Magazine Photographers.

I have been a freelance photographer for over 12 years. I work in California and my work includes primarily multi-image slide shows, brochures, and annual reports. My clients are corporations, advertising agencies and audio-visual (A.V.) production houses. I am also an audio-visual producer who hires freelance photographers.

I've seen a sharp increase in work for hire in the past several years, particularly among the audio-visual producers. In fact, I recently saw an article in a trade magazine by a producer advising other producers how to get around the problem of rights: with work-for-hire contracts. I was horrified.

As an audio-visual producer, I have never asked a freelancer to sign a work-for-hire contract. Audio-visual producers are the worst. Budgets are being cut, bids are getting fiercely competitive. So they have to find some way to save money and taking it out of freelancers' pockets seems to be their solution.

First they demand that I carry all liability insurance and that I have the most updated state-of-the-art equipment. Then they want me to sign a contract saying that they own the work. On top of that, they won't return any of my outs (unused film) and I figure that only about one-tenth of what I shoot is actually used. This means that they get to use and reuse my work, reselling it for big bucks without paying me an extra penny.

What a-v producers are doing these days is building huge slide libraries which they can use in dozens of shows without paying additional fees. They pay the photographer for a one-time use and then turn around and charge each client for every use. They seem to have found a loophole in the law and are using it to the hilt.

Recently I was negotiating with an ad agency for a job where they wanted me to photograph a celebrity using one of their products. They anticipated using the photos later for direct mail and a consumer magazine. I quoted them a day-rate and told them that we could negotiate for future uses.

They were pretty straightfoward: "We don't want to pay anyone all that money for nothing," they told me. I lost that $5,000 contract and lots of others for the same reason. But I'm lucky. Think of all the beginning, struggling photographers who just can't afford to refuse work for hire.

Many companies already have photographers on their staffs. Why do they go outside to hire freelancers? Because they know they're going to get more creativity and better quality. At the same time, they want to get it for nothing.

Photography is a difficult art and the demands are great. Each time we do a photograph, we make a new little invention. The work begins long before and continues long after the picture is produced. Work for hire destroys the creative incentive and it's going to destroy quality work.

I've worked over 12 years to get this far and I'm not going to sell myself. Why spend all that extra time and energy on a work when you're paid employee wages without getting a single employee benefit? I own my work and I'm willing to sell it - but only for a fair price.

STATEMENT OF ROGER ALLEN GRIGG
MEMBER, AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman,

My name is Roger Allen Grigg and I have been freelancing as a photographer for more than eight years. Most of my work is for publications, such as Inc., The New York Times and Time, as well as for corporations such as Coca-Cola and Southern Bell.

More and more I am seeing work-for-hire written into new purchase orders. It is becoming such an issue that it is seriously interfering with not only the creativity but also the professionalism of my work. For example, I used to do work for IBM - a client I valued and enjoyed working for. Recently, I received from them an "Agreement to provide photographic services" stating that the photography and all component elements thereof, including, but not limited to, any color transparencies, negatives and prints shall belong to IBM and shall be deemed to be works made for hire." I'd like to work for them but I just cannot sign that.

In the copyright law, they have found a loophole called work-for-hire and are trying to drive a truck through it. It seems that every job is now work for hire. Generally, work-for-hire seems to crop up in the lower paying jobs. For some photography buyers, it seems simpler to ask for a work-for-hire than it is to state and then negotiate what rights they need.

Work-for-hire produces several economic consequences for me -- first and foremost it affects my portfolio. No one is going to hire a photographer on the basis of a resume and an oral description of his work. They want to see samples. If I do work-for-hire, the photographs do not belong to me. I do not have anything I can put in my portfolio. I cannot use the photography in my promotion. I cannot even say that I did it. If a potential client wants to be a "nice guy", he can assign me back my own photo for use in my portfolio, but then I have given something that's mine and I have to beg to have it back.

With work-for-hire, the photographer gets none of the benefits of being an employee and still has all of the responsibilities of an independent businessman. The next time a client asks for work-for-hire, I think I will say "yes," and then ask about the medical plan, paid vacation, social security, retirement and other employee benefits.

The quality of my work is also affected by work-for-hire. My fee is based on the complexity of shooting a photograph and on how it is going to be used. If I do a black and white passport photo, I will charge one price. If it will be used in a press kit, I will charge another and if it's for billboards coast to coast to elect a Presidential candidate, that is still a different price. If a client tells me what he or she wants in a photo, how it will be used and what the budget is, I can make certain creative choices. What kind of lighting do I need, should I bring a stylist, do I need to hire a location scout, what

kind of film to shoot and what selection of lenses. With work-for-hire, a client does not have to say what the photo is being used for so it's like shooting in the dark without a flash. It not only hurts me but the client as well. A friend who is an audio-visual producer told me about a client who took a photograph shot on Ektachrome 200 film for a slide show and used it for a print ad. It looked horrible as a print ad, a purpose for which the photographer never shot the photo.

I got into the photography business because I like to shoot photographs. It's also a way to make a living. I do not expect to get rich but I'm not starving either. I like to use my creative skills and vision and I am proud of my work. I'm tickled pink when a potential client calls and has a need for my services. I'm excited by the thought of solving creative problems, but work-for-hire really turns me off. I do not like to shoot on a job if I feel I am being treated unfairly. I just do not work as hard.

Now I am at a point where I just tell a potential client to call someone else if all they want is work-for-hire and they are unwilling to negotiate use. I would bend over backwards to permit any usage a client needed. Should you want to print my photographs on T-shirts in Borneo, I'd give you that right and would probably add $1.50 to the bill. But I do want my photographs back. I just will not do work for hire anymore.

For instance, in February 1989, I was contacted by the photo desk at Insight magazine regarding a photography assignment in Atlanta, Georgia. Since I was previously familiar with their work for hire policy and had written a letter to them protesting it, I asked if this assignment would also be a work for hire. The photo researcher said yes but pointed out that 1) it was a small assignment, 2) most of the photos would be returned and 3) it was an event for which I probably would not care getting the photos back. So could I shoot it?

My reply was, if it was so insignificant to them, why did they require a work for hire arrangement? Why not buy one time editorial rights? The answer was policy. Reluctantly, I turned down the assignment and suggested they call someone else because I feel strongly that work for hire is wrong. I also found it difficult to negotiate with a large magazine publisher who says "take it or leave it" regarding a work for hire assignment.

Last, I could not in good conscience recommend another photographer in Atlanta since I would not wish a work for hire assignment on any of my fellow photographers.

STATEMENT OF WILLIAM P. HAMILTON
CHAIRMAN OF THE BOARD OF GOVERNORS
THE ASSOCIATION OF MEDICAL ILLUSTRATORS
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Work-for-hire contracts prevent freelance artists from realizing the full potential of their considerable creative abilities. Further, these discriminatory contracts denigrate artists' abilities and contributions to the advertising and publishing industries by implying that artists are only technical renderers under higher "creative direction." Such an implication grossly belies the truth.

The Association of Medical Illustrators (AMI), a partner in the Copyright Justice Coalition, is uncategorically opposed to the use of work-for-hire contracts in any freelance situation.

The AMI is a non-profit, professional association, organized in 1945. Its approximately 700 members are highly trained and concentrate their artistic efforts in one of the most specialized areas of the graphic arts. Because of their extensive backgrounds in science, medical illustrators frequently do much of the research and conceptualization for their clients in the development of graphics projects. It is, therefore, highly ironic when they are pressured to sign work-for-hire agreements on the basis of the commissioning party's supposed control or supervision of the project at hand. It is often the medical illustrator who develops the concept and explains to the commissioning party how it works!

The AMI's Board of Governors unanimously passed an official resolution against the implications of the work for hire provisions and their abuse by art buyers at its 1982 annual meeting. This resolution was subsequently voted on and passed by the membership.

In concert with the Copyright Justice Coalition, the AMI continues to put forth much effort in an attempt to bring the injustice of the current uses of work for hire to the attention of members of Congress. This effort also has the support of several hundred of the country's leading physician/authors who have written Congress on our behalf. This coalition of artists' groups representing thousands of artists nationwide, is dedicated to the elimination of work for hire and other unfair trade practices used in the graphics arts industry. The abuses that are rampant today must not be allowed to continue.

Statement of Michal Heron
Member, American Society of Magazine Photographers
In Support of S.1253
Before the Subcommittee on Patents, Copyrights and Trademarks

Mr. Chairman, my name is Michal Heron. I am a member of the executive committee of the American Society of Magazine Photographers. I have been a professional photographer for over 20 years. My future as a photographer is bleak due to the devastating effects of work for hire.

As a professional, I find creative ways to translate a client's message into an arresting visual. As I see it, my client's interests are my interests in that sense. I make sure that their needs are met and that their interests are protected. However, the partnership disintegrates when I try to negotiate for an equitable fee and appropriate rights. The acid that disintegrates our partnership is work for hire. I am in a no-win situation. If I turn down work for hire, I lose my clients and my income. If I accept work for hire, I lose my pride in my craft, future income from resale of my pictures and my ability to survive. I am between a rock and a hard place.

Let me give an example. A client needed photos for a series of books. Half from existing photo sources and half through original assignments. I supplied as many existing photos as I could from my own stock files. They offered me the assignment of shooting a significant portion of the remaining photos. I offered to negotiate based on the rights and protections they needed. They refused to negotiate. They said it was work for hire, their hands were tied. I had to turn it down. I lost a job with an immediate value of at least 20 percent of my annual income and more in potential stock sales.

I have two sources for income--assignments of new work, and the licensing of reproduction rights from my own stock of photos. Income from stock sales has allowed me to take time to experiment with new techniques, to develop new photographs. As a result, I developed a richness of style. All of this benefited my clients.

There has been a dramatic change in the last few years as companies in all areas of our business insist on work for hire. Of the 15 regular clients I had in the last 16 years, I lost five because of work for hire--that's one third of my client base. It is like a brush fire. I live with the foreboding that one more of my regular clients will turn to work for hire. It becomes harder and harder to find clients who don't demand work for hire. I cannot put time, effort, and love into photos which have resale potential and then have them stuck in a file somewhere and forgotten or just as dreadful, have the client resell my pictures to others. My authorship rights and residual income are down the drain and I don't have a thing to say about it.

Why do publishers want us to do work for hire? They say they want reversion rights and exclusivity. They can get all the rights they want just by negotiating fairly with us. Why do they need work for hire? There is an old fable about a dog lying in a manger full of hay. An ox leans down to eat. The dog snarls and bites him. Day after day the dog lies on the hay while the ox grows thinner and thinner. "Why are you doing this?" says the ox, "You don't need the hay. You don't even eat hay!" "I don't need it," growls the dog, "but I've got it!" Is that why we are fighting for our professional lives, because of a dog in a manger?

Work for hire makes my future in the profession bleak. The future for new photographers is hopeless. Without our pride, without any assurance of future income from our work, we are no longer craftsmen or professionals or independent business people, but day laborers. This is true for all photographers in every area of the profession whether publishing, advertising or corporate. It is dangerous to our culture and our economy and denies creators the right to claim authorship and the ability to survive. Work for hire isn't necessary. The danger won't be over until the law is changed.

Statement of Peter B. Kaplan
Member of the American Society of Magazine Photographers
In Support of S.1253
Before the Subcommittee on Patents, Copyrights, and Trademarks

Mr. Chairman, my name is Peter B. Kaplan. I have been a professional photographer for over ten years. For more than nine years, I have had my own business and it has been a successful one. My pictures have been in Life magazine, in Kodak ads, on the new Statue of Liberty, U.S. and French commemorative postage stamps and on stamps of 50 different nations. Still, I am a victim of work for hire.

I generally refuse to do work for hire whether it is called that or "buyout with transfer of copyright". It rarely makes sense for anyone involved. The buyer pays for usage rights he may not need and the best creators feel cheated and do not produce their best. Only once has a client been willing to spend the money for the multiple usage rights conferred by a work for hire arrangement. Usually this is a right buyers want without having to pay for it.

Furthermore, I don't believe in creating an image so someone else can own it. I don't want to see my photographs gathering dust in some executive's desk drawer. I am a photographer for two reasons: to create pictures for people to see and enjoy and to make a living. If I give up all rights to my work, it may be shelved where no one will see it and it assuredly won't bring me the future revenues that allow me to stay in business.

Despite my refusal to perform commissions as works for hire, my career has suffered because of the practice. Life magazine ran one of my photographs as an editorial photo several years ago without notifying me or paying me for the use. Reuse by a magazine of Life's reputation and size is worth a substantial amount, depending on the dimensions of the reproduction, and I objected. Life said that they owned the picture and had every right to rerun it because it was created as a work for hire. Luckily, I knew I had never signed such an agreement with them for, if I had, I would have lost that photo forever. Ultimately, I brought suit against Life to recover the fee for the unauthorized use of my work and we settled the suit after years of depositions for a price that was over ten times what I would have charged for the disputed usage. As a result of this litigation, Life will no longer use my services after twelve years of building a working relationship.

I have had other sobering experiences with Eastman Kodak. A few years ago, Kodak did a commercial using me as "talent" and including some of my photography. Everything was done and pictures taken without a written contract, but when I later received the contract it contained a work for hire clause. Kodak insisted on having the copyright for the photographs they had used. I was just as adamant and told them that if they wanted unlimited control over my pictures they could forget about this ad even though it was already completely finished or "in the can". Their lawyers became involved and created a furor, but when the executives and I finally had a chance to talk, I explained that I was willing to give them just about any right they wanted as long as it was negotiated upfront and in specific terms. Finally, they took out the work for hire clause, but they didn't like it.

The next time with Kodak I wasn't nearly so fortunate. They wanted a buyout with transfer of copyright. It seems that another photographer had used a photo he had done for them for his own ad in one of the professional talent directories. I told them that ethical photographers wouldn't engage in such practices, protections could be included in a negotiated contract, and I would be happy to give them first use rights and agree not to sell the photo to a competing company. The art buyer thought my position was fair, but the Kodak lawyers demanded the copyright. I lost a $5,000 job that day.

Work for hire also put an end to my volunteer work on the Statue of Liberty project for the Statue of Liberty - Ellis Island Foundation, Inc. For four years I was the "preferred photographer" and performed all my services gratis, receiving no fees and no expenses. All I required was my right to keep the copyright. The money I earned from the pictures made it possible for me to volunteer my efforts.

Then the PR man decided that they had to own my shots outright. So they pushed me aside and hired another photographer under a work for hire agreement. It wasn't rational -- the pictures aren't as good -- they can't be. You never put as much love and time into work for hire as you do into work you own, which has your imprint. It costs the Foundation more and that young guy can't feel very good about his pictures; the better they are, the worse he will feel because he will never own them; they may never be published; they may not even bear his name. This happened because a lawyer decided that the Foundation is better off owning outright a group of pictures they will probably never use.

Over the past two years, I have noticed that more and more clients are asking for "work for hire", "buyout", "transfer of copyright" or whatever term opens a loophole which enables them to obtain all rights to my work. The practice prevents me from retaining any future source of income from my work. Sadly, though, with many clients, if you don't relinquish all rights to your work, you simply cannot work for them.

STATEMENT OF E. ALAN McGEE
MEMBER, AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman,

My name is E. Alan McGee and I am a professional photographer based in Atlanta, Georgia. I specialize in architectural and commercial photography, as well as corporate and advertising photography. I believe that work for hire is extremely damaging to our industry.

The most important experience I've had with work-for-hire contracts involved my relationship with the Meredith Corporation. In 1975, I met an art director from Meredith and I began working for them. Gradually, I got more and more work from them. On December 29, 1977, though, I received an express letter with a work for hire contract and a note saying, "Sign this by January 1, 1978 or you can't do any more work for us." I signed it. They paid a decent day rate and they were using the material only in their own publications. Eventually, I was billing them some $60,000 a year which represented about 45 days worth of work. When I received and signed the contract, I was at the beginning of my career. I didn't know what this contract would come to mean to me. I found out.

Subsequently, though, they formed Meredith Publishing Services and began sending my pictures to their clients--Georgia Pacific, for instance--paying me $50 for each color photo used and $15 for black and white. By signing away my rights in 1978, I later estimated that I lost no less than $200,000 which I approximate to be the value of the work to me if I had retained the copyright. The images are unique and valuable. No one has images like them.

On April 19, 1983, I wrote to Meredith complaining about the injustice of the situation. I was in a financially strong position at the time and could afford to send that letter. I realize that a lot of my colleagues would not be able to do that. They informed me that they could no longer use my services.

I am a successful photographer and have had sixteen years in the field. I make about 17 percent of my income from stock photos. When I no longer have the rights to my work, my heart's not in my work. There is no incentive to "go the extra mile" because you will not be able to use the image. Moreover, it is possible for photographers to lose anywhere from 10-100 percent of their income if they lose their rights.

In my experience, I have found that work for hire is a deterrent to good client relationships and hampers creativity. It also helps to concentrate management of the photographic industry in the hands of very few. By retaining rights to my photographs and refusing to do work for hire, I am able to employ five tax paying citizens who might otherwise be unemployed.

When clients have presented work for hire contracts to me, I have successfully negotiated around them by asking the client exactly what was needed, writing the contract to reflect these needs and pricing the work accordingly. By this means, I am able to retain copyright ownership and those reproduction rights not needed by my client.

Work for hire eliminates the negotiation process so vital for relationships. I appeal to the Congress to adopt S.1253 and to allow the creative community the opportunity to negotiate freely and claim authorship of and copyright in its work.

STATEMENT OF FLORENCE SCORE MITCHELL
MEMBER, GRAPHIC ARTISTS GUILD
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman,

My name is Florence Mitchell. I have been an artist for many years, doing mostly work for hire. I am almost always employed full or part-time in some other field just to pay bills.

For the past several years I have been freelancing full-time as an illustrator for children's books. I am still having to rely on work for hire, or "ghost illustrating," as I call it, a situation where I draw and someone else puts their name on the work.

My financial situation fluctuates between critical and desperate because of work for hire, and too often my visions for my own work dim in my despair.

STATEMENT OF LEONARD MORGAN
MEMBER, ASSOCIATION OF MEDICAL ILLUSTRATORS
GRAPHIC ARTISTS GUILD
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman,

My name is Leonard Morgan and I am a freelance medical illustrator based in Illinois, an active member of the Association of Medical Illustrators, member of the Midwest Medical Illustrators Association, and a member of the Graphic Artists Guild.

Much of my work has been done for educational publishers and my clients require a great deal of creativity and stylistic originality for their books. In addition to stylistic innovation, my work must be technically accurate without plagiarizing the work of any other illustrator. Therefore, I must not only be creative, but also highly educated and knowledgeable in my subject.

The idea that publishers are the creators because they "dictate" the content and therefore the creativity of instructional material is ludicrous.

I am hired by publishers to do medical illustrations for their books because I know more about medical anatomy and related subjects than anyone on their staff, and I have considerable creative experience in my field. They rely on me to produce something unique and creative that will give their book a competitive edge in the marketplace. Of course they specify what they want to see on a specific page, i.e. full color drawing of the anatomy of the digestive system in the human body, but the difference between a verbal description of what they want and the creative process of actually producing an original visual image based on their verbal description is vast indeed. If not, they would be able to produce the artwork themselves and would never require the services of freelance talent.

The challenge of the educational illustrator is to creatively present factual visual information in a new and innovative or original way that will help stimulate the interest of the learning student. Each individual illustrator brings his or her own unique "style" and "look" to the illustrations done. That uniqueness is what the buyers of illustration are buying when they purchase use rights from an artist. The quality and creativity of illustration in a text book is a primary key to its success in the school book market and, more importantly, to its teaching effectiveness.

I have personally given up most of my educational work in favor of advertising because of the abuses of work-for-hire. The only educational publishers I work for now are the ones who allow me to negotiate out the use of work-for-hire clauses in their purchase orders. The use of work-for-hire contracts is increasing. Work-for-hire agreements allow publishers to treat my work like the work of an employee, wrongfully and against my will. They can do this without even paying me benefits that I would receive if I were an employee.

As a freelance artist, I must pay for my own beneifts, such as health insurance and a pension plan. Work for hire is a loophole of the law that wrongfully permits publishers to take away my natural right to hold copyright to my original creative works and it thereby steals away my rights to financial gain from the use of my creative works.

I believe that the alternative of purchasing limited use rights would be easily workable, and unlike the work-for-hire agreements, which deprive the rights of artists, would serve the needs of both publishers and artist.

The use or work-for-hire contracts, as currently being practiced, basically allows publishers to legally rob freelance artists and designers by allowing the publishers to "get it all" just for the price of the first-time use rights.

We who contribute a great deal to the quality of education and learning in the United States are long overdue for proper legal protection of our rights in our creative works.

Thank you.

STATEMENT OF JOE NETTIS
MEMBER, AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman,

My name is Joe Nettis. I have been a professional photographer for over thirty-five years and am a member of the American Society of Magazine Photographers. I work in industrial and corporate photography as well as editorial and illustration photography. I believe that work for hire robs me of my rights and of fair compensation for my work.

Work for hire affects me primarily in my use of stock photography (which involves secondary sales of photographs taken for assignments). These stock photos are primarily outtakes and seconds from shoots. I send my work to four stock houses, and half of what they sell goes to me. I am sixty years old and I consider them my retirement fund. Many of my colleagues also consider stock photos as retirement income. If a stock photo is generic enough, it can have a re-sale life of ten to fifteen years. This income is vital to me for the time when I am no longer able to carry out assignments. The attached quarterly statement from one of my stock agencies indicates just how much income a photographer can derive from resale of a single photograph. One picture of a doctor looking over x-rays, for instance, has been available in stock for five years and has sold at least six times. Had this photograph been a work for hire, this income would have been lost to me.

I object to work for hire because it not only deprives me of an income, but there is no rationale for any client to not allow me to re-use these photos for stock. The publishers, agencies and corporations argue that they control the shoot, that they set it up and that we are only technicians. But in my work they often send me out on my own. For example, I did a shoot of employees involved in various community activities for a large corporation. Even though a company representative was with me, his only job was arranging contacts, not acting as an art director. Most of the concepts, and of course the visualizations, were mine.

Stock photos are very, very important to the industry. Over the past decade their quality has risen and it pays for a buyer to purchase them. The irony is that many magazines and agencies which use work for hire contracts are the same ones that ask me to provide them with stock photos. They want what they're eliminating.

Prior to this practice of work for hire there was never a question about rights. It was always assumed that the photographer had all rights to his pictures. I'm concerned about professional ethics, of course. I always wait a year before releasing stock photos, and I would never sell them to a client's competitor. But I would never give up the rights because we never know who will want a photo. In the 1950's I had photographed Adlai Stevenson for HOLIDAY magazine. When he died a year later, LIFE magazine used my stock photo for their cover shot. It suited their needs and it was a good photo.

Work for hire deprives photographers of needed income. It deprives me of essential retirement income.

PHOTO RESEARCHERS, INC. DATE: 02/22/89

60 EAST 56TH STREET NEW YORK, N.Y. 10022 (212) 758-3420

PHOTOGRAPHER STATEMENT NUMBER 14026 — FOR CHECK NUMBER 28043

SEND TO:
JOSEPH NETTIS
1534 SANSOM STREET
PHILADELPHIA , PA 19102

PHOTOG # NET001

INVOICE	CUSTOMER NAME	TYPE	USE	PHOTO #	DESCRIPTION	RE-USE	BILLED	DUE
0045615	INSIGHT MAGAZINE	C	3	603070	CUSTOMER AT PHARMACY - 1/4 PAGE	N	$150.00	$75.00
0045850	CHILDREN'S T.V. WORKSHOP	C	3	5K2820	FARM NEAR MORGANTOWN, PA - 1/4 PAGE	N	112.50	56.25
0045968	SAUNDERS COLLEGE PUBLISHING	C	1	5Y1138	WELDER - 1/4 PAGE	N	187.50	93.75
0045979	ZEFA	C	L	6A6269	PHILADELPHIA	N	54.86	27.43
0046000	PACIFIC PRESS SERVICE	C	L		PAPER COMPANY	N	278.29	139.15
0046000	PACIFIC PRESS SERVICE	C	L	602001	CAT SCAN	N	185.52	92.76
0046000	PACIFIC PRESS SERVICE	C	L	6J0375	PICASSO MUSEUM	N	69.57	34.79
0046000	PACIFIC PRESS SERVICE	C	L	6J0610	ST. PAUL DE VENCE	N	69.57	34.79
0046000	PACIFIC PRESS SERVICE	C	L	6J0404	CAR	N	69.57	34.79
0046000	PACIFIC PRESS SERVICE	C	L	6J0614	ST. PAUL DE VENCE	N	69.57	34.79
6010	PACIFIC PRESS SERVICE	C	L	5Y0931	STOCK EXCHANGE	N	162.33	81.17
0046010	PACIFIC PRESS SERVICE	C	L		HOUSTON BUILDING	N	162.33	81.17
0046011	PACIFIC PRESS SERVICE	C	L		OPERATION ROOM	N	185.52	92.76
0046011	PACIFIC PRESS SERVICE	C	L	608956	WASHINGTON	N	69.57	34.79
0046042	PRENTICE-HALL, BOOK COMPANY	C	1	5M0440	PHYSICAL THERAPIST W/OLDER WOMAN-1/4 PG(REUSE	Y	112.50	56.25
0046116	WEST PUBLISHING COMPANY	C	1	5V2154	DOCTOR EXAMINING PATIENT - 1/4 PAGE	N	112.50	56.25
0046118	TIERBILDER OKAPIA KG	C	L	5V2180	MALE	N	57.37	28.69
0046142	CHARLES E MERRILL PUBLISHING	C	1	6J6722	(P-9-7) MEDICAL TECHNICIAN - 1/4 PAGE	N	127.50	63.75
0046184	HARCOURT BRACE JOVANOVICH	C	1	602272	GRADUATION CAP - 1/4 PAGE	N	137.50	68.75
0046318	THE PICTURE BOX b.v.	C	L	6F3532	MEDICAL STAFF AT PHILADELPHIA HOSPITAL	N	84.84	42.42
0046326	PRENTICE-HALL, BOOK COMPANY	C	1	5N6053	PEOPLE OUTDOORS - 1/4 PAGE (REUSE)	Y	84.38	42.19

TOTAL : $1,271.69

LESS DEDUCTIONS : 55.00

AMT DUE : $1,216.69

TYPES: B=BLACK/WHITE, C=COLOR, V=CONVERSION

END OF REPORT

STATEMENT OF DANIEL PELAVIN
MEMBER, GRAPHIC ARTISTS GUILD
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman,

My name is Daniel Pelavin. To my best understanding, when you sign a work-for-hire contract, you are agreeing to be a pair of hands under someone else's constant direction, and that the illustration that you create will not just become someone else's property, but be considered as created by them with you as technical assistant. Furthermore, the fee that you are receiving covers all reproduction rights forever and ever. You will not see another penny, no matter how many times or ways the art is reproduced.

When I became a freelance artist, I gave up the security of a regular paycheck, insurance, vacation, bonus, retirement and other benefits of a staff job in return for the opportunity to compete freely based on the merits of my work and to realize the greatest return from my efforts.

To a freelance artist, work-for-hire means taking all the risks and receiving none of the benefits. Most insidious of all, though, is that nothing in the wording of such a contract makes it clear that you are forfeiting copyright protection, ownership and even authorship of a work under such an agreement.

Statement of William Rivelli
Member of the American Society of Magazine Photographers
In Support of S.1253
Before the Subcommittee on Patents, Copyrights, and Trademarks

Mr. Chairman, my name is William Rivelli, and I am a former member of the board of ASMP. I began my professional career as a photographer's assistant at Life magazine, and I have been working for over 30 years. I specialize in corporate photography, particularly annual reports, and I also do some advertising photography.

Work for hire is a pernicious practice which has crept into almost every advertising contact I have secured recently. After a job is negotiated, regardless of what has been said, I receive a purchase order with words to the effect, "we own the photo and every right to its reuse". I cross out the standard clause and write "as per our agreement" to remind the client of the specific terms of our negotiation. Sometimes that works.

I do not do work for hire and I've lost a great deal of corporate work because of my stand. It is ironic that my business has dwindled because of my opposition to work for hire because I represent the American ideal of individualism, paying my own way in return for the right to claim my own work. Clients pay only my fee and expenses related directly to a job. I receive no benefits and shoulder all the burdens of overhead including studio rent and various insurance premiums, all of which represents a considerable amount.

In a recent conversation, a client I have known for years mounted the usual defenses of work for hire and I tried to counter his misconceptions. The client had complimented me on my portfolio but remarked that he could never hire me because of my stand on work for hire. He was regretful, but justified his approach, saying, "we don't want to go back to you every time we want to use a photo for internal communications."

Of course this fear is totally unfounded. I have always been willing to negotiate upfront with my clients for any accommodations they require, any conceivable use of a photograph. Our usual working arrangement is to allow use in the annual report and display for any internal corporate purposes, but I am prepared to negotiate rights for exclusive multiple uses if my fee reflects such an arrangement. If I retain rights to a photograph, my own practice of reselling some work through stock agencies is in no way threatening to my corporate clients. I do not release photos for eighteen months and then I only use "generic" photos in which no products or individuals are identifiable. In any case, I have always asked for and received an original client's permission before offering a photograph as a stock shot.

This same client also objected that, "we feel because we provide the situations for taking the photographs, we own the work". However, he knows that I don't simply sell film or react to situations set up by others. I offer my expertise and style. If the initiative to take a photograph guaranteed good results, this client could commission the company photographer or anyone else to do his work, but it isn't that simple. Frequently I've been sent on assignment with instructions such as, "shoot our new plant in the Midwest for our annual report". When I arrive with five cases of equipment, I find that construction on the plant has barely started, a fact that has escaped the people at corporate headquarters, and it may rain for the entire shoot. Still I'll come back with good photographs of the plant site because I can draw upon years of professionalism. Maybe

an inexperienced kid who is willing to sign away all rights could do the same kind of job, but I doubt it.

Even after we discussed all these factors, the client commented that he wasn't satisfied with the quality of photographic work he had received lately; he wasn't ready to make the connection between work for hire and a decline in quality, but the fact is that photographers who must give up all rights to their work simply don't have the same kind of commitment to the creative process.

It is interesting, too, that often the companies who rely on blanket work for hire contracts are the greatest users of stock photographs. Apparently they have not considered the sources of stock which are diminished because of work for hire practices. Their own policy hurts these corporate managers and art directors.

A recent experience illustrates one aspect of the work for hire issue: the fact that both commissioning parties and creators can benefit from negotiations about the equitable disposition of copyright conducted before completion of a project. The bill before you would insure the right to such negotiations.

When I prepared a bid for a Postal Service assignment, I quoted a reasonable single use fee for the intended purpose and an additional triple fee surcharge for an "all rights buyout". The limited rights alternative was an economical and fair option which the Postal Service accepted, preferring my work to that of the other bidders. When you can reason with clients and they do not blindly defer to the uncompromising policies of their legal departments, it is possible to explain why copyright has such value for a creator and to strike an agreement acceptable to both parties.

The issue isn't just about money of course. After the money I receive for a photograph has been absorbed back into my business, there is only the picture itself. If I am underpaid for the picture and my rights in the photograph are taken away and accorded no value, there is no incentive to invest myself in the work. I am a professional and I will not cut corners or do a poor job to meet the budget of clients who underpay and demand rights to everything on a work for hire basis. Few clients will pay for quality or for rights to reuse a photograph anymore. Instead, there is pressure to give in and agree, "I'll do anything". So far I haven't done that and I'm staying afloat, but I don't know how long I can last.

STATEMENT OF ELLEN SCHUSTER
MEMBER, AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman, my name is Ellen Schuster. I am a Dallas-based studio photographer best known for large-format multiple exposure surrealistic images. I have enjoyed considerable success, especially as an advertising photographer, and have worked for several major advertisers such as American Airlines, Kodak, Coca-Cola, Frito Lay, Texas Instruments, and Phillips 66, among others. My editorial photographs have appeared in Omni, Psychology Today, and other publications.

I would like to share with you one of my experiences which illustrates the dilemma faced by photograhers who are frequently presented with work for hire agreements after completion of a commissioned work.

In late 1987, I distributed a promotional mailer containing examples of my work to a number of editors and publishers. Shortly thereafter, I was contacted by the assistant to the art director of Time magazine. She reported that they were impressed by my work and asked me to do a cover for an upcoming issue.

A few days later, Time's art director called and asked if I could create a photographic illustration for a cover story on the greenhouse effect. We discussed the greenhouse phenomenon, and during the course of that talk and subsequent conversations, I suggested showing the earth, with a glow around it to symbolize heat, "trapped" in a greenhouse floating in outer space. The art director liked the idea, but asked if I could place the earth in a cloudy sky as he had liked my pictures of cloudy skies. I argued that it didn't make sense for the earth to be floating in its own atmosphere, a blue sky and clouds, rather than in space, but eventually we compromised and I added some clouds at the bottom at his request. Apart from this guidance about the clouds, the concept was mine.

During these conversations, we also discussed price. Time offered $3,000.00 for the job, agreed to my request for $1,000.00 to cover expenses, and the art director encouraged me to begin work on the project.

I immediately ordered props, shot for two days and sent the film out. The art director's assistant quickly called me to say that they were very pleased with the results and that I should submit my bill. A few days later I received a contract from Time specifying that Time owned all rights to the work as a work made for hire although I was employed as "an independent contractor and not as an employee of Time." The contract Time sent me is attached to this statement. I objected that I would not sign a contract containing such langauge and responded to the assistant's invitation to alter the contract to suit my needs by deleting the work for hire provision.

Another round of calls ensued. The art director was upset by my changes to the contract, referred me to Time's legal department, and finally stated bluntly that if I didn't sign the contract with work for hire language, Time would not publish my photograph. I feared then that I would be unable to recoup my expenses.

I was angry and disappointed because I had negotiated a price for the job on the basis of a single use fee, work for hire had never been discussed before completion of the work, the concept and its execution were mine, and I felt I had been chosen for the job because of my particular surrealistic style which is not easily duplicated by other photographers. Moreover, loss of copyright represents a significant loss of potential income. Some of my photographs have sold dozens of times. Over a lifetime, such photographs are worth many thousands of dollars and it is unjust to be forced to release them as works for hire for a fee reflecting one use. In short, there seemed to be no reason to relinguish my copyright. However, I had already incurred expenses and couldn't afford to become embroiled in a dispute. Reluctantly and under pressure, I signed the contract with work for hire provisions intact.

TIME
INCORPORATED

TIME & LIFE BUILDING
ROCKEFELLER CENTER
NEW YORK 10020
JUDSON 6-1212

October 6, 1987

Ellen Schuster
Elle
3719 Gilbert
Dallas, TX 75219

Dear Elle:

You and TIME Magazine hereby agree to the following allocation of rights with respect to artwork that you create for publication in TIME (the "Artwork"):

1. Artwork commissioned by TIME for use as a TIME cover and published as such shall be considered work made for hire for purposes of U.S. copyright law. TIME shall retain all rights in such cover artwork and shall own the original artwork, as well. Notwithstanding the above, you shall have the right to use the artwork for purposes of your own self promotion.

2. For all other Artwork, you grant to TIME the exclusive worldwide right to first publish the Artwork as well as the following:

   a) the right to reproduce the Artwork in advertising and promoting the issue of TIME in which it is published, without additional payment;

   b) the right to reproduce whole pages or substantial parts of pages that include the Artwork, without additional payment;

   c) the right to reproduce the Artwork in TIME and other publications of Time Inc., its subsidaries and affiliates, subject to payment of the publication's then prevailing space rates; and

   d) in the event a portion of the Artwork is used on a corner of a TIME cover as a "flap", the right to reproduce the portion used as a "flap" whenever the entire cover is reproduced, without additional payment.

3. In the event that the Artwork is not published by TIME, TIME shall return it to you and retain no rights therein.

4. You expressly agree that you will perform your services as an independent contractor and not as an employee of TIME.

5. The allocation of rights described herein shall apply to all Artwork you have created or will create upon commission for TIME from October 1, 1987 until such time as you give TIME written notice that this agreement is no longer effective.

Please confirm that this accurately and completely sets forth our understanding on the points covered herein by signing and returning the enclosed copy of this letter.

Sincerely yours,

Dorothy D. Chapman
Deputy Art Director, TIME

CONFIRMED AND AGREED TO:

By _____
Ellen Schuster (Elle)

STATEMENT OF DANA SIGALL
PHOTOGRAPHER
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Mr. Chairman,

My name is Dana Sigall, and I have been supporting myself as a photographer for over five years.

I had always been wary of work for hire. But a few years ago an incident brought the danger home to me.

A company, which no longer exists, had been buying my photos regularly. I had a good relationship with them, and they with me. But this time, after we had worked out the budget and schedule for a series of photos, they handed me a new contract. This one had clearly printed on it that the work was being done for hire, and that they could keep the negatives. I was appalled. I had never signed a work-for-hire contract with them. What is more, I hated the idea of giving up the right to my negatives.

I explained this to them. I told them that if they had the negatives, they would be responsible for having any future prints made. No one could print the photo as carefully as me. No one else knew the lighting of the original shot. It was quite likely that if they tried to reprint from those negatives, they would wind up with inferior photos. Then, I explained, what if some future manager who didn't know my work was looking through the files to find a photographer for a project? He would take one look at the badly reprinted photo and say "who shot this picture?" The manager is likely to consider only who shot the photos, not who printed it. The responsibility for a bad print, through ignorance, would likely fall on me. He would look at the back and he would see my name "Dana Sigall." That would be the end of my work for the company.

I offered to sell them whatever rights they would need, but not the total surrender of rights and negatives implied by a work-for-hire agreement. They said that they understood, but that they would have to check with their superiors. After that, I went through several levels of people. I was finally told that the lawyers insisted on work for hire. It was the final word. In fact, the lawyers were upset that I hadn't signed away all my rights to the earlier works. The clear message was that I wouldn't get future work if I didn't agree to sign.

I signed and I did more work for them. I couldn't afford not to. They were one of my major clients. Suddenly, I found out that the company was gone. It had been bought out by another firm. My negatives were gone. I tried to trace them. I tried to contact the company - nobody knew where they were - they were somewhere in their files, with some department. Somewhere, someone has my negatives, and can reprint my photos any way that they see fit. They can use my name or not. Those photos have gone completely out of my control. I don't even know who controls them now. I have no recourse, because I had signed a work-for-hire contract.

It is getting worse and worse. More and more companies try to make you sign a work-for-hire clause. I try to fight it. Sometimes, I do have to accept it. I don't like it, but when I look at my accounts receivable, I have to live.

I have lost money from signing work for hire agreements. It could have been worse, but I am young. I don't depend on stock sales of my pictures to keep me going. The money I've lost is from not being able to resell prints of my work. A photographer who has been around for a while hopes to have built up a large number of stock pictures. He depends on the sale of those stock photos to live. That is his annuity. If he sells his work outright, he has nothing.

Statement of Burt Silverman
Member, Graphic Artists Guild
In Support of S.1253
Before the Subcommittee on Patents, Copyrights, and Trademarks

Mr. Chairman, my name is Burt Silverman. I am an illustrator with over 25 years of experience in the business. I was threatened by a major corporation that I would not be hired in the future and I would not be paid for work I had already done because I didn't want to do work for hire. It was the most outrageous and blatant example of strong-arm tactics.

I had worked very infrequently for CBS - only four or five times during the last ten years. This was an assignment to do an album cover. In the past, I sold only reproduction rights, and if the company wanted to own the work, I sold that separately.

But in the interim that I'd last worked for them, CBS apparently felt themselves to be losing something to their freelance help and decided to make the signing of a work-for-hire agreement mandatory before commissioning any artwork, photos included.

In my circumstances I feel that there was some kind of slip-up in the process. I was not given a contract, nor was I told that there would be one forthcoming. It was not until CBS was over six months late in paying me, and after I had submitted several invoices (all of them somehow lost or misplaced), indeed after I billed them for $98 in finance charges, that this ex post facto document was sent to me.

The CBS lawyer-accountant who spoke to me said: (a) I would not get paid unless I signed the contract; (b) I could never work for CBS records until I agreed to work-for-hire contracts as a matter of policy; and (c) the protracted legal problems I would face to get paid would not be worth the relatively small dollar amounts being billed.

In this case, $2,000 was involved and I had no recourse but to sign a work-for-hire contract. Small claims court will only deal with $1,500 and it was not enough money to be worth paying legal fees. In the future, I will refuse to do work-for-hire for CBS.

I don't want to be a hero. I am vulnerable to pressure if the stakes are high enough. It is nevertheless clear to me that the way to stop this unfair practice is through legislation. For one thing, the corporations are paying terribly little for what they are getting. Secondly, they're undercutting all other wage scales that have been establisned painstakingly over the years, and which often are still incommensurate with the real value of the artwork produced.

Advertising art, though it has been upgraded in the last few years, is still paying only about 10 percent of the billing, and yet often provides more than 80 percent of the visual pull of the ad.

If you sell the artwork and the copyright for money now offered for one specific reproduction right, you are undercutting yourself and providing the purchasers with another weapon to competitively downgrade the prices paid for art.

STATEMENT OF THE
AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC.
IN SUPPORT OF S. 1253
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Why We Support Reform of the Work-For-Hire Provision of The Copyright Law of 1976

The Copyright Clause of our Constitution clearly intends the creators of original works to enjoy the fruits of their labor, in order to encourage the creation of such works. Under the "work-made-for-hire" provision of the Copyright Law of 1976, the creator of a work such as a magazine article may have that creative role wrested from him or her, even prior to the creation of the work, while the mantle of "author" is settled upon another party and the actual author is deemed an "employee," albeit enjoying none of the benefits normally due an employee. Such works as magazine articles have value beyond one-time publication, with a potential for republication in digest periodicals, anthologies, and the like. Remuneration for repeated dissemination of these works should accrue to their authors, not to others who have unjustly assumed that title. This situation has been especially onerous for emerging talents who do not yet posess the stature and financial resources to resist the coercive bargaining power of publishers from whom they must seek assisgnments. The American Society of Journalists and Authors, representing our nation's independent nonfiction writers, believes that amendment of the Copyright Law, assuring creators the protection promised by our Constitution, is urgent and imperative.

Attachment C

PDN Editorial

245 Reasons Not To Work For Hire

Some food for thought on the subject of photographs purchased for small amounts of money by newspapers owned by major media conglomerates, and the ramifications of work for hire.

Terms Of The Sale

Excerpt from the paperwork sent by *USA Today* to its freelance contributors:

"... you agree that your work shall be a work made for hire and that this letter transfers to *USA Today* and its affiliated corporations all copyrights in your work throughout the world. Gannett Co., Inc. and its affiliated operations and licensees will have worldwide exclusive publishing rights to the material ..."

What Is Gannett?

A description of the Gannett Co. from its annual report for 1987:

"The company is a nationwide, diversified information company with three principal business segments in 40 states and the District of Columbia, two U.S. territories, Canada, Great Britain, Hong Kong, Singapore and Switzerland."

The newspaper segment consists of 90 daily newspapers, including *USA Today*, and 35 non-daily newspapers. At the end of 1987, the daily net paid circulation for all Gannett newspapers was over 6.2 million.

The broadcasting segment includes 10 television stations and 16 radio stations.

The outdoor advertising segment involves the selling of ad space on billboards Gannett owns or leases in 10 states and Canada.

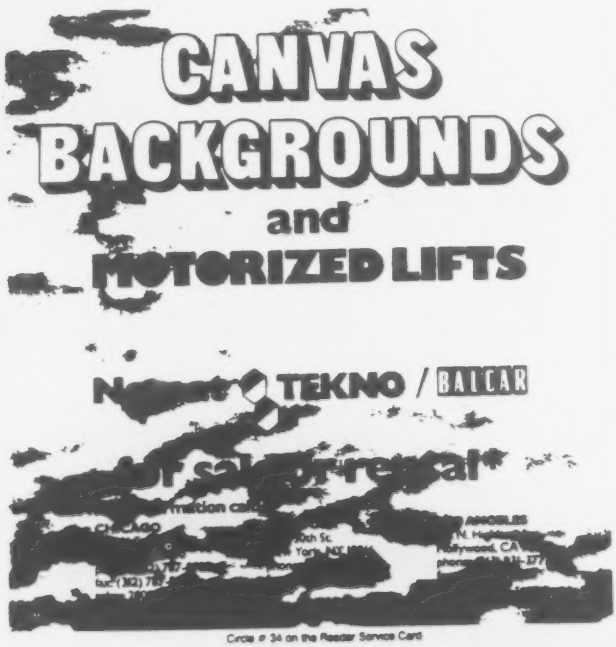
The company's total operating revenues for the fiscal year ending December 27, 1987, according to its annual report, $3,079,447,000.

The company's total assets, same source: $3,510,250,000.

Some of the places within the Gannett Co. that could use, without further payment, a photograph sold to *USA Today*:

Daily Newspapers

Tucson Citizen, Tucson, Arizona
Arkansas Gazette, Little Rock, Arkansas
Daily News, Indio, California
Marin Independent Journal, Marin County, California
The Desert Sun, Palm Springs, California
Salinas Californian, Salinas, California
The San Bernardino County Sun, San Bernardino, California
The Stockton Record, Stockton, California
Visalia Times-Delta, Visalia, California
Fort Collins Coloradoan, Fort Collins, Colorado
Norwich Bulletin, Norwich, Connecticut
The Morning News, Wilmington, Delaware
Evening Journal, Wilmington, Delaware
Florida Today, Brevard County, Florida
News-Press, Fort Myers, Florida
Pensacola News Journal, Pensacola, Florida
The Times, Gainesville, Georgia
Pacific Daily News, Agana, Guam
Honolulu Star-Bulletin, Honolulu, Hawaii
The Idaho Statesman, Boise, Idaho
Commercial-News, Danville, Illinois
Rockford Register Star, Rockford, Illinois
Journal and Courier, Lafayette, Indiana
Chronicle-Tribune, Marion, Indiana
Palladium-Item, Richmond, Indiana
The Des Moines Register, Des Moines, Iowa
Iowa City Press-Citizen, Iowa City, Iowa
The Coffeyville Journal, Coffeyville, Kansas
The Courier-Journal, Louisville, Kentucky
News-Star-World, Monroe, Louisiana
The Times, Shreveport, Louisiana
Battle Creek Enquirer, Battle Creek, Michigan
The Detroit News, Detroit, Michigan
Lansing State Journal, Lansing, Michigan
Times Herald, Port Huron, Michigan
Sturgis Journal, Sturgis, Michigan
St. Cloud Daily Times, St. Cloud, Minnesota
Hattiesburg American, Hattiesburg, American
The Clarion Ledger, Jackson, Mississippi
Jackson Daily News, Jackson, Mississippi
The News-Leader, Springfield, Missouri
Fremont Tribune, Fremont, Nebraska
Reno Gazette-Journal, Reno, Nevada
The Courier-News, Bridgewater, New Jersey
Courier-Post, Camden, New Jersey
Millville Daily, Millville, New Jersey
Vineland Times Journal, Vineland, New Jersey
The New Mexican, Santa Fe, New Mexico
Press & Sun-Bulletin, Binghamton, New York
Star-Gazette, Elmira, New York
The Ithaca Journal, Ithaca, New York
El Diario-La Prensa, New York City
Niagara Gazette, Niagara Falls, New York
Poughkeepsie Journal, Poughkeepsie, New York
Democrat and Chronicle, Rochester, New York
Times-Union, Rochester, New York
The Saratogian, Saratoga Springs, New York
Observer-Dispatch, Utica, New York
The Daily Times, Mamaroneck, New York
The Daily Argus, Mount Vernon, New York
The Standard-Star, New Rochelle, New York
The Citizen Register, Ossining, New York
The Star, Peekskill, New York
The Daily Item, Port Chester, New York
The Daily News, Tarrytown, New York
The Journal-News, West Nyack-Rockland, New York
The Reporter Dispatch, White Plains, New York
The Herald Statesman, Yonkers, New York
Chillicothe Gazette, Chillicothe, Ohio
The Cincinnati Enquirer, Cincinnati, Ohio
The News-Messenger, Fremont, Ohio
The Marietta Times, Marietta, Ohio
New Herald, Port Clinton, Ohio
Muskogee Daily Phoenix, Muskogee, Oklahoma
Times-Democrat, Muskogee, Oklahoma
Statesman-Journal, Salem, Oregon
Public Opinion, Chambersburg, Pennsylvania
The Reporter, Lansdale, Pennsylvania
Valley News Dispatch, Tarentum, Pennsylvania
Argus Leader, Sioux Falls, South Dakota
The Jackson Sun, Jackson, Tennessee
The Tennessean, Nashville, Tennessee



Circle # 34 on the Reader Service Card

Circle # 38 on the Reader Service Card

E. Plain Dealer, E. Palestine, Ohio
The Barrington Eagle
Barrington, Vermont
The Virgin Islands Daily News, St. Thomas, Virgin Islands
The Bellingham Herald, Bellingham, Washington
The Olympian, Olympia, Washington
The Herald-Dispatch, Huntington, West Virginia
Green Bay Press-Gazette, Green Bay, Wisconsin
Wausau Daily Herald, Wausau, Wisconsin

Non-daily newspapers
16 weekly or semiweekly publications in
Connecticut,
Florida,
Georgia,
Hawaii,
Iowa,
Mississippi,
New Jersey,
New York,
Pennsylvania,
Virginia.

Television stations
KPNX-TV, Phoenix, Arizona
KUSA-TV, Denver, Colorado
WUSA-TV, Washington, D.C.
WTLV-TV, Jacksonville, Florida
WXIA-TV, Atlanta, Georgia
WLVI-TV, Boston, Massachusetts
KARE-TV, Minneapolis-St. Paul, Minnesota
WFMY-TV, Greensboro, North Carolina
KOCO-TV, Oklahoma City, Oklahoma
KVUE-TV, Austin, Texas

Radio stations
KIIS AM & FM, Los Angeles, California
KSDO, San Diego, California
KSWV-FM, San Diego, California
WDAE, Tampa-St. Petersburg, Florida
WUSA-FM, Tampa-St. Petersburg, Florida
WGCI AM & FM, Chicago, Illinois
KCMO, Kansas City, Missouri
KCPW-FM, Kansas City, Missouri
KUSA, St. Louis, Missouri
KSD-FM, St. Louis, Missouri
KOAI-FM, Dallas, Texas
KKBQ AM & FM, Houston, Texas
KNUA-FM, Seattle, Washington

Gannett International
Publishes an international edition of *USA Today* with offices in:
New York City;
Agana, Guam;
Hong Kong;
Singapore;
London, England;
Zurich, Switzerland.

National Newspaper Sales
Advertising sales offices in:
New York City;
Atlanta, Georgia;
Chicago, Illinois;
Detroit, Michigan;
Los Angeles, California;
San Francisco, California.

Gannett New Media Services
A variety of new ventures, including:
USA Today Books,
USA Today Radio,
USA Today Classline Today,
USA Today Sports Hotline,
USA Today Update.

Gannett News Service
A wire service with offices in:
Arlington, Virginia;
Albany, New York;
Baton Rouge, Louisiana;
Brevard County, Florida;
Columbus, Ohio;

Harrisburg, Pennsylvania;
Indianapolis, Indiana;
Lansing, Michigan;
Marin County, California;
New York City;
Olympia, Washington;
Sacramento, California;
Springfield, Illinois;
Tallahasee, Florida;
Trenton, New Jersey.

Gannett Offset
Printing plants in:
Arlington, Virginia;
Chandler, Arizona;
Miramar, Florida;
Atlanta, Georgia;
Norwood, Massachusetts;
Olivette, Missouri;
Nashville, Tennessee.

Gannett Outdoor
An outdoor advertising company which leases space on approximately 39,700 advertising displays (poster panels, billboards, and other displays) which reach an audience of 58.6 million people in:
New York City;
Phoenix, Arizona;
Berkeley, California;
Los Angeles, California;
San Diego, California;
San Francisco, California;
West Sacramento, California;
Denver, Colorado;
New Haven, Connecticut;
Chicago, Illinois;
Detroit, Michigan;
Flint, Michigan;
Grand Rapids, Michigan;
Kansas City, Missouri;
St. Louis, Missouri;
Fairfield, New Jersey;
Houston, Texas;
Toronto, Ontario; plus Mississauga, Montreal, Quebec City, Winnipeg and 26 other cities in Canada.

Television Programming
A number of companies, such as:

GTG Entertainment production company, a joint venture to produce television programming in partnership with Grant Tinker Enterprises.

Culver Studios in Culver City, California, a production company.

America Today, a news service which provides stories to more than 150 Public Broadcasting Service stations each week.

The New Program Group, a consortium with four other television station group owners to develop new television programming.

Miscellaneous Other
Louis Harris & Associates, an international research company with offices in New York City; London, England; Paris, France.

USA Weekend, a weekend newspaper supplement available in 295 newspapers throughout the country, with a total circulation of 14.6 million.

Adding It Up
For one small fee, Gannett Co. purchases the right to use the photograph in 90 daily newspapers, 36 non-daily newspapers, 10 television stations, 16 radio stations, six international-edition offices, six sales offices, five "New Media" ventures, 15 news service bureaus, seven printing plants, outdoor advertising outlets in 48 cities, four television programming companies and two miscellaneous enterprises.

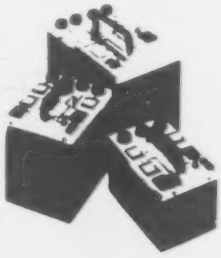
In our book, that adds up to 245 reasons not to agree to work-for-hire terms. ■

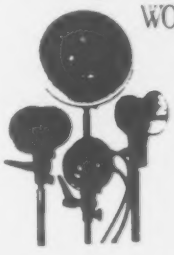
Thanks to D.W., who sent us a copy of the USA Today freelancers agreement.

won·der

n **1a:** a cause of astonishment or surprise: marvel **b:** miracle **2:** the quality, sense, or a state of exciting amazed admiration **3:** a feeling of doubt or uncertainty. *adj* effective or efficient far beyond anything previously known or anticipated

More than 15 Years ago Dyna-Lite had the WONDERFUL idea to make Flash equipment small & lightweight. NO WONDER we became a household word to so many photographers. Doesn't it make you START TO WONDER why it took till now for our competitors to first introduce their idea of small and lightweight. Maybe they were WONDERING if we were right (all along) about what you really wanted and needed. Or maybe they were WONDERING how to do what we did so long ago. So if you ever WONDER who started everyone WONDERING, think of Dyna-Lite THE "SMALL WONDER"





Dyna-Lite, Inc.
Dyna-Lite Inc., 811-419 Long Ave
Hillside, NJ 07205 (201) 687-9800

Circle # 38 on the Reader Service Card.

Attachment D

BHN
ADVERTISING AND PUBLIC RELATIONS

910 NORTH ELEVENTH STREET
SAINT LOUIS, MISSOURI 63101-2996
314 241 1200

MEMBER AMERICAN ASSOCIATION OF ADVERTISING AGENCIES

ROBERT F. RUBIN
SECRETARY/TREASURER

May 12, 1989

[redacted]

As a matter of policy, BHN requires all suppliers of photography, illustrations and other artwork to sign the agreement enclosed.

Please read the agreement, sign and date it, and return it to my attention as soon as possible so that we may have it on file for our records.

If there are any questions regarding the agreement, please do not hesitate to contact me.

Many thanks for your cooperation in this matter.

Sincerely,

Robert F. Rubin

RFR/cls

enclosure

AGREEMENT

WHEREAS, BHN Advertising and Public Relations Inc. (hereinafter "BHN"), a corporation of the State of Missouri having a principal place of business at 910 North Eleventh Street, St. Louis, Missouri 63101 is a corporation engaged in the business of producing advertising and promotional materials, and

WHEREAS [redacted], (hereinafter [redacted]) is a company with an address of [redacted] engaged in the business of photography and/or illustration, said creative activity giving rise to work protectable by copyrights therein, and

WHEREAS, BHN is desirous of establishing a working arrangement with [redacted] and the terms and conditions to govern the purchase and sale of [redacted] work and all rights, including copyrights, thereto,

NOW, THEREFORE, in consideration of the receipt of $1.00 (one dollar), the mutual covenants and promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. From time to time, BHN will engage [redacted] by way of purchase order, letter, oral agreement, or otherwise for the performance of certain activities in the creation of certain work, the details of price, delivery, type of work, etc. to be determined between the parties in each instance. However, unless

otherwise expressly stated in writing and signed by both parties in any particular instance, the parties hereto expressly agree that all work performed by [redacted] for BHN shall be considered a "work made for hire," and all rights including copyright in the work shall initially vest in BHN. To the extent that any work is not a "work made for hire," [redacted] hereby assigns to BHN all its rights including copyright in the work and hereby expressly releases BHN and its client from any liability for their use of the work. [redacted] hereby also grants to BHN the right to register its claim to copyright, and artist agrees to execute such documents, including applications, assignments, or other documents necessary to perfect ownership of the copyright and other rights in the work in BHN or its client's name.

2. This agreement shall be valid for a period of one year from the date of execution, and automatically renewed for subsequent one-year periods with the right of either party to cancel at any time with 30 days prior written notice to the other.

3. This agreement represents the entire agreement between the parties, and can only be modified by a subsequent written agreement executed by both parties.

BHN Advertising and Public Relations Inc.

Date: _____ _____

Date: _____ [redacted]

SAATCHI & SAATCHI COMPTON INC.
625 MADISON AVENUE, NEW YORK, NEW YORK 10022
TELEPHONE (212) 754-1100 TELEX 421289

Order Date 12/22/86 | P.O. No. A 13408

Supplier | Supplier Telephone No. | Job No. TVO 5367
Address | CS
Product Pasture

Job Title "GRANOMA"
Usage exploratory only - no usage.

Job Description (re: invoice # 86157)
exploratory comp. fees for
"GRANOMA" + "MOMMY" DRAWINGS.
If selected for TV use, additional work will be necessary (3 finished pieces, each subject)
fee (if bought out) - #

Thank you for your help - will call you after 1/5/87 regarding status of job.

Cost | Tax ☐ 5½% ☐ 4% ☐ Tax Exempt | Ordered By | Art Director

UNLESS OTHERWISE NOTED IN THE FOLLOWING SPACE, ALL TERMS AND CONDITIONS ON THE BACK OF THIS ORDER ARE FULLY ACCEPTED BY SUPPLIER.

TO THE SUPPLIER:
Invoice in quadruplicate. Show the purchase order no., job no. and client indicated above on all invoices, packages and references to the order.

Send invoice to: Saatchi & Saatchi Compton Inc.
625 Madison Ave., NY, NY 10022
Att: Print Cost Control Dept.

Supplier must countersign a copy of this purchase order. Unless agency has received a countersigned copy or a countersigned copy is attached to supplier's invoice, supplier will not receive payment.

This order is subject to all the terms and conditions stated on the face and the back of this order. If any terms in acceptance of this order or invoices by supplier are not identical to the terms of this order, the terms of this order shall govern. No oral agreement or other understanding shall in any way modify or change this order or the terms thereof unless agreed in writing and signed by agency.

Supplier Signature

D-2

1. **PAYMENT RESPONSIBILITY AND TERMS.** Agency agrees to pay, and Supplier agrees to look solely to Agency, for payment for the material covered by this purchase order. Payment will be made after receipt of Supplier's proper invoice. Supplier shall not be entitled to payment for the material furnished hereunder unless all releases required herein have been delivered to Agency in a timely manner, nor to reimbursement of expenses (provided such expenses have previously been approved in writing by Agency) unless Supplier furnishes simultaneously with its invoice a final and complete detailed itemization of each expenditure for which reimbursement is requested. Such itemization shall include specific invoices or receipts substantiating each such expenditure claimed. All props or other material for which reimbursement is sought shall be delivered to Agency prior to payment therefor.

2. **COPYRIGHT OWNERSHIP/USE.** In the event that the material which is the subject of this order is copyrightable subject matter, Supplier and Agency hereby agree that for the purposes of this order the material shall be a "work made for hire" and the property of Agency as agent within named client. In the event that the material which is the subject of this order is not copyrightable subject matter or for any reason is determined not to be a work made for hire, then and in such event Supplier hereby assigns all right, title and interest to said material to Agency as agent for its within named client. Any terms of copyright ownership or use other than as provided in this paragraph must be specifically stated on the front of this order to be effective. Otherwise, any contrary limitations on copyright ownership or use shall be deemed void. Without limiting the foregoing, if Agency's right to use the material is in any way limited in time, Supplier agrees that during such time, Agency's rights to such use shall be exclusive and Supplier will not use, license or permit the use of the material for any other purpose, except, where applicable, as part of Supplier's portfolio. Thereafter, Supplier further agrees that it will not use, license or permit the use of the material supplied hereunder for any product or service competitive to the product or service of Agency's within named client for which the material supplied hereunder is used.

3. **SCOPE OF RIGHTS.** Unless otherwise provided on the front of this order, the rights of Agency herein include, but are not limited to: (a) the right to use the material in such manner as Agency shall determine, without limitation; (b) the right to alter or rearrange such material; (c) the right to secure copyright therein; and (d) the right to sell or otherwise exploit such material.

4. **SUPPLIER'S WARRANTY.** Unless otherwise provided on the front of this form, Supplier hereby represents and warrants: (a) that no third party has any rights in, to, or arising out of, the material supplied hereunder; (b) that Supplier has full right and power to enter into this agreement; (c) that all models and any other living persons, or the representatives of any deceased persons having rights of publicity, and the owner of any unique or unusual inanimate objects, which are used in the material, have executed releases allowing unlimited use by Agency (Supplier shall supply Agency with copies of said releases with the material ordered hereunder); and (d) that the material supplied hereunder complies with Agency's specifications and is free from any material defects in design or workmanship.

5. **INDEMNITY.** Supplier agrees to hold Agency, its within named client and their respective assigns and licensees, harmless from and against any loss, damage or expense, including court costs and reasonable attorneys' fees, that Agency, its client, and their assigns and licensees may suffer as a result of any breach or alleged breach of the foregoing warranties or of any kind or nature resulting from the use in any manner of the material, including, without limitation, artwork, negatives, and photographs furnished by Supplier hereunder. Agency agrees to similarly hold Supplier, and its assigns and licensees harmless with respect to any materials supplied by Agency.

6. **REJECTION AND APPROVAL RIGHTS.** Agency reserves the right to reject and not pay for material not delivered in accordance with the specifications of this order, including timely delivery which is of the essence. Complaints, or notice of defects in workmanship or design of the material, or notice of rejection of material will be forwarded to Supplier promptly after Agency and/or its client have reviewed the material. If approval rights of Agency are to be limited in any way, it is the responsibility of Supplier to obtain Agency's written consent to such limitations, either on the front of this form, or in a separate, written agreement, signed by the Agency.

7. **ENTIRE AGREEMENT, AMENDMENTS.** The terms and conditions set forth herein constitute the entire agreement between the parties. This order is at the price specified herein, except with respect to estimate sales and use taxes applicable to the services and materials provided, and Agency will not recognize any claim for an increased price, unless approved by Agency in writing prior to the commencement of or during the course of completing the work. No charge will be allowed for packing, crating, transportation or storage without the Agency's prior written consent. None of the direction provided Supplier by Agency's representatives during Supplier's fulfillment of this order shall be considered a change of project specifications, or shall justify a change in the agreed cost unless specifically agreed to in writing by the Agency.

8. **CANCELLATION.** The order may be cancelled by Agency at any time prior to its acceptance of the material covered by this order, upon written notice to Supplier. In such event, Agency will pay Supplier, in lieu of the price specified on the front of this order, the direct non-cancellable costs theretofore incurred by Supplier and any direct non-cancellable committed costs, in the performance of its obligations hereunder prior to such cancellation; provided, however, that the total amount of such costs shall not exceed the price specified on the face of this order. If there are charges in connection with its services, Agency will not be responsible for such fees or penalties unless so provided on the front of this form or in a separate written agreement, signed by the Agency.

9. **CONFIDENTIALITY.** Supplier covenants and agrees that it will not disseminate, reveal or otherwise make available to others, or use for its own purposes, any information of a proprietary or confidential nature concerning Agency or Agency's within named client, learned by Supplier in the course of fulfilling this order, regarding, but not limited to, trade secrets and confidential information, advertising materials, ideas, plans, techniques and products.

10. **ASSIGNMENT.** The fulfillment of this order, or any sums payable hereunder, may not be assigned by Supplier without the prior written consent of Agency.

11. **AUDIT.** Agency shall have the right to audit those financial records of Supplier which pertain to the material specified on the front of this order, during ordinary business hours on not less than two (2) days' prior notice.

12. **GOVERNING LAW.** The provisions hereof shall be interpreted in accordance with the laws of the State of New York.

ROSS ROY INC.
A SUBSIDIARY OF ROSS ROY GROUP

06/12/89

Dear Vendor,

Ross Roy, Inc. (the Agency) has recently completed an evaluation of its purchasing terms and conditions. This evaluation has resulted in a revision of our standard terms and conditions as well as operating procedures. These new terms and conditions can be found on the attached sample. Following is a summary of procedures to follow in the future.

* A vendor countersigned purchase order must be submitted before the Agency may process invoices for payment

* No invoice may be processed for payment if any of the following conditions exist:

  - The invoice does not reference a valid Agency purchase order.

  - The invoice references more than one valid purchase order.

  - The invoice exceeds the total purchase order amount or invoices to-date against the purchase order exceed the total.

  - The invoice does not show distribution of total amount with same line item detail as the purchase order.

  - The federal tax identification for the vendor has not been supplied to the Agency. The identification number on record will print on each purchase order; please review for accuracy.

  Invoices with any of these conditions will be returned to the Vendor.

* Invoices are to be addressed as follows:

  Ross Roy, Inc.
  Attn: Accounts Payable Department
  100 Bloomfield Hills Parkway
  P.O. Box 3100
  Bloomfield Hills, Michigan 48302-3100

Reference # ST0711

Under no circumstances are signed purchase orders or invoices to be hand delivered to the buyer or other Agency employee.

* All invoices are to be submitted in triplicate.

* All invoices are to be received by the Agency within thirty days of delivery of goods or services. Invoices received beyond thirty days may result in delayed payment. Further, invoices not received within ninety days of delivery of goods or services which result in lost billings to Agency clients will relieve Agency of obligation to pay invoice.

* No changes to a purchase order may be considered a change in the agreed upon price unless specified in writing by the Agency through the issuance of a revised purchase order.

Each of these procedures was designed to provide the Agency with better control over purchases and related accounts payable. It is intended they will allow us to more timely process invoices for payment. An invoice not complying with any of these procedures places it outside our control boundaries and risks a high instance of loss and/or delayed payment.

We currently have the following information with regard to your company on our files:

Federal Tax Identification/ Social Security Number	382436633
Company qualifies as Minority Business	NO
1099 Required at Year-end	NO
Terms Offered: Days/Percent	0 / .000
Telephone Number for Inquiries	( ) ___ - _____
Contact Name	

Could you review each item and inform us of necessary changes or provide us with missing information. You may do this by completing the enclosed form and returning it to the Accounts Payable department.

If you have any questions regarding these matters, please do not hesitate to contact me.

Sincerely,

David C. Heist
Group Controller

Reference # ST0711

TERMS AND CONDITIONS

Agency agrees to purchase and Vendor, by acceptance hereof, agrees to supply, sell, and deliver subject to the instructions, terms and conditions appearing on the face and reverse side of this order the goods and/or services (hereinafter called "goods") described on the face side hereof. Any sub-order, unless otherwise expressly stated therein, shall be subject to the instructions, terms, and conditions of the original order bearing the same serial number.

Unless otherwise specified, goods are to shipped in cheapest manner, observing specific routing. If transportation is prepaid, forward receipted bill for transportation charge with invoice. Packing list must accompany each shipment. Agency count will be accepted as final and conclusive on all shipments not accompanied by a packing slip.

This order will not be effective unless a countersigned copy is returned to the Agency within ten days and prior to delivery of goods and invoicing.

Any additional or different terms or conditions set forth in any communication from Vendor shall not be effective or binding unless consented to in writing by Agency through its assigned representative.

No changes or substitutions may be made without the prior written consent of the Agency through its assigned representative.

This order is not assignable by Vendor without prior written consent of Agency through its assigned representative.

Vendor assumes risk of loss and damage until receipt of the goods by Agency.

Payment shall be due upon completion of this order and delivery of the goods provided that Vendor has complied with all instructions, terms, and conditions set forth herein. Payment in full or in part shall not prejudice any rights of Agency against Vendor with respect to non-conforming goods or otherwise. Invoices not received within 30 days of delivery of goods may result in delayed payment. Invoices not received within 90 days that result in lost billings to Agency clients will relieve Agency of obligation to pay invoice. The cash discount period to Agency shall date from the receipt of Vendor's invoice in the Agency's Accounts Payable Department and not from the invoice date. Should an invoice be returned for correction, the cash discount period shall date from receipt of the corrected invoice.

Agency reserves the right to reject and not pay for goods not delivered in accordance with the specification of this order, including timely delivery which is of the essence. Complaints, or notice of defects in workmanship or design of the goods, or notice of rejection of goods will be forwarded to Vendor promptly after Agency and/or its client have reviewed the goods.

For purposes of this order and in the event that the goods which are the subject of this order are copyrightable subject matter, Agency and Vendor hereby agree that the goods shall be a work made for hire, and the property of Agency as agent for the within named client. Vendor's deposit of Agency's check for payment due hereunder shall constitute a writing between Vendor and Agency required pursuant to 17 U.S.C. Section 101 in connection with works made for hire. In the event that the goods which are the subject of this order are not copyrightable subject matter, or for any reason are determined not to be work made for hire, then and in such event Vendor hereby grants all right, title, and interest to said goods to Agency as agent for the within named client.

Agency's exclusive rights hereunder include, but are not limited to: (a) the right to use the goods in such manner as Agency shall determine, without limitation, including use in advertising and for purposes of trade; (b) the right to alter or rearrange such goods; (c) the right to secure copyright therein; (d) the right to sell or otherwise exploit or dispose of such goods or any of the said rights included herein; and (e) any and all subsidiary rights therein.

Should Agency place any property into the possession of Vendor in accordance with this order, Vendor shall safeguard and be the insurer of such property and shall keep it free and clear of all liens and shall not assert any claim or lien against such property and shall be responsible for its safe return to Agency upon completion of this order.

Vendor shall indemnify, save harmless, and defend Agency and its within named client from all claims and damages for loss, damage, or injury to person or property arising out of the performance of this order and from all claims that any of the goods supplied by Vendor infringe any patent, copyright, or other right of another person or were supplied or sold in violation of the law.

The order may be cancelled at any time prior to its acceptance of the goods covered by this order, upon written notice to Vendor. In such event, Agency shall be liable to pay Vendor in lieu of the price specified on the face of this order, the direct non-cancellable costs theretofore incurred by Vendor and any direct non-cancellable committed costs incurred in the performance of its obligations hereunder prior to such cancellation, provided, however, that the total amount of such costs shall not exceed the price specified on the face of this order.

This order constitutes the entire contract between Agency and Vendor with respect to the described goods. None of the direction provided Vendor by Agency's representatives during Vendor's fulfillment of this order shall be considered a change in the agreed cost unless specifically agreed to in writing by the Agency.

Vendor covenants and agrees that it will not disseminate, reveal or otherwise make available to others, or use for its own purposes, any information of a proprietary or confidential nature concerning Agency or Agency's within named client, learned by Vendor in the course of fulfilling this order, regarding, but not limited to, trade secrets and confidential information, advertising materials, ideas, plans, techniques and products.

Work provided under this order is subject to audit.

The provisions hereof shall be interpreted in accordance with the laws of the State of Michigan.

422 P02

E. I. DU PONT DE NEMOURS AND COMPANY
WILMINGTON, DELAWARE 19898

EXTERNAL AFFAIRS DEPARTMENT

July 31, 1989

Dear

We have been notified by our Legal Department advisor that a recent case before the U. S. Supreme Court will require that we add another paragraph to our photo agreement with our vendors. The following paragraph is what we propose adding to the existing language of our agreement:

"Du Pont and Independent Contractor also hereby expressly agree for good and sufficient consideration tendered and received that should Du Pont not already own by operation of law or otherwise all copyright rights in the work product to be produced pursuant to this contract, Independent Contractor hereby sells and/or assigns any and all rights, title and legal interest he/she may have in such work product to Du Pont."

I hate to subject creative types to this mind-numbing legalese, but I'd appreciate your reaction.

Sincerely,

Craig

Craig C. Garner, Editor
Du Pont Directions Magazine

CCG:mb
attachment

D-4

'72 P03

PHOTOGRAPHIC AGREEMENT AND TRANSFER OF COPYRIGHT

ASSIGNMENT: _____

_____

_____

In consideration of payment for the above photographic assignment, I hereby agree that all photographs, as well as their negatives, are works for hire and are, or will become without further consideration, the property of E. I. du Pont de Nemours and Company (Du Pont). Du Pont will be recognized under the Copyright Revision Act of 1976 as the full and sole "author" of the copyrights as produced.

No proprietary right other than copyright is claimed by Du Pont. I retain the right to revise, adapt, prepare derivative works, present photographs and/or slides in connection with an oral presentation, or distribute the work, provided that all such uses are for my personal, noncommercial benefit and are consistent with any prior contractual agreement between Du Pont and me.

It is also understood that if a photograph taken for another purpose should be used by Du Pont as the focal point of a national advertising (paid space) campaign or in the company's Annual Report, additional payment will be made, the amount of which will be determined and agreed to through good faith negotiations.

I understand that during the course of my work under this agreement my status with Du Pont is that of an independent contractor. As such, I will not be eligible for, or entitled to, benefits which normally accrue to Du Pont employees. Further, as an independent contractor, I am not, nor shall I hold myself out to be, an employee, agent, partner, joint venturer or servant of Du Pont.

APPROVED AND ACCEPTED:

_____ _____

(Signature) (Date)

External Affairs
Wilmington DE 19898

SERVICES AND MATERIALS AGREEMENT

It is anticipated that Du Pont may from time to time engage in a business relationship with you to supply services and materials. If so, the following terms and conditions apply, unless specified otherwise by Du Pont in writing. Individual purchase orders may contain additional terms and conditions.

A. For jobs expected to exceed $5000, a preliminary estimate, in letter form, is required prior to the start of any work. All cost estimates supplied to Du Pont buyer are for buyer's information only and shall not constitute a commitment to purchase.

At approval of concept, a detailed written estimate is required, and must be approved by Du Pont by issuance of a purchase order.

If the total actual cost is $1000 or less, the supplier need not furnish a formal estimate of costs, nor is a Du Pont purchase order necessary. Supplier will send invoice to the Du Pont buyer.

TERMINATION OF INDIVIDUAL PURCHASE ORDERS. Du Pont reserves the right for any reason, at any time, to terminate any individual purchase; and will be liable for all substantiated costs incurred by supplier up to the date of termination.

Du Pont reserves the right to provide or purchase from others any portion of an individual proposal or estimate of cost submitted by supplier.

B. "ALL SERVICES/MATERIALS PURCHASED BY DU PONT SHALL BE 'WORK FOR HIRE' UNDER THE COPYRIGHT LAWS." Supplier hereby sells, transfers and assigns to E. I. du Pont de Nemours and Company, full and exclusive property rights in the material, work or service purchased by Du Pont including, but not limited to, all copyright interest, all foreign and domestic literary, artistic and industrial property rights, and all reproduction rights. Supplier warrants that it has full right to sell, transfer and assign the material, work or service and that same may be used or reproduced without violating any laws or the rights of any third parties.

C. All right, title and interest in the art, photograph(s) including negatives, printing negatives, and plates purchased under this order shall pass to the purchaser without territorial or other restrictions on its ownership and use upon payment of suppliers invoice.

D. It is anticipated that Du Pont will from time to time disclose to you (meaning your Company if you represent a company) certain technical or business information and may also request that you develop information for Du Pont at Du Pont's expense. With respect to all such information:

1. For a period of five (5) years following the date of each such disclosure or development you shall maintain such information confidential, except:

   a. information which is or becomes known publicly through no fault of yours,

   b. information learned by you from a third party entitled to disclose it, or

   c. information already known to you before receipt from or development for Du Pont, as shown by your prior written records.

2. You shall not, without prior written permission of Du Pont, furnish to any third party any equipment or material embodying or made by use of any information received or developed hereunder or use such information for purposes other than internal evaluation so long as such information must be maintained confidential; provided, however, that nothing herein shall prevent you from furnishing to third parties equipment or material embodying or made by use of any such confidential information furnished by the third party. All confidential information in tangible form received or developed hereunder, shall be sent to Du Pont at Du Pont's request.

3. No right or license, either expressed or implied, under any patent is granted hereunder.

(over)

4. You shall not disclose confidential information received or developed hereunder nor assign work hereunder to anyone other than your employees who have agreed in writing to maintain the information confidential.

5. Termination of this agreement shall not relieve you of any obligation with respect to information disclosed or developed hereunder prior to termination.

E. You will obtain and submit to Du Pont releases against claims for libel, slander, misrepresentation and invasion of the rights of privacy and publicity from all individuals depicted or referred to in the course of any advertising, promotion, publicity or public affairs program.

F. Your relationship with Du Pont under this agreement shall be that of an independent contractor, and nothing contained in this agreement shall constitute you or your subcontractors as an employee, joint venturer, partner, agent or servant of Du Pont.

G. You agree to exercise your best judgment consistent with the highest standards of your profession in the performance of any service(s) and/or the preparation of any work product (including the selection and work product of any subcontractor(s) selected by you) for Du Pont, with a view to avoiding any claims, proceedings, or suits being made or instituted against you or Du Pont. Nevertheless you agree to indemnify, defend and hold Du Pont harmless from and against any and all losses, claims, suits, damages, expenses and liabilities arising out of or relating to, occasioned or caused by negligent performance by you or your subcontractor(s), of the services or work products under this Agreement. Provided that Du Pont shall notify you within a reasonable time of the receipt by it of any notice of claim or demand or service of legal process upon it involving any of the matters for which you have agreed to hold Du Pont harmless, you shall have the right at your election, to take over or participate in the defense of any claim to which its indemnity attaches and Du Pont shall cooperate fully in that regard.

It is mutually agreed that Du Pont will indemnify against any loss you may incur as the result of any claim, suit or proceeding made or brought against you based upon any service or work product which you prepared for Du Pont and which Du Pont specifically approved or directed in writing before its publication or broadcast or upon any defects in products manufactured or sold or services rendered by Du Pont, provided that you shall notify Du Pont within a reasonable time of the receipt by you of any notice of claim or demand of service of legal process upon it involving any of the matters for which Du Pont has agreed to you hold harmless. Du Pont shall have the right, at its election, to take over or participate in the defense of any claims to which its indemnity attaches and you shall cooperate fully with Du Pont in that regard.

If the above is satisfactory to you, will you kindly indicate your acceptance by signing and dating below and returning one agreement in the enclosed envelope for our files. Thank you for your cooperation.

E. I. du Pont de Nemours and Company

By _____

Title _____

Print Name _____

Company _____

Address _____

_____

_____

_____
(please print)

By _____

Title _____

Print Name _____

D–4

G.F. CO. BUSINESS FORMS
Division of Glasser PRINTING CO. G-4-68 INC.

Purchase Order

Bozell, Jacobs, Kenyon & Eckhardt, Inc.

SOUTHWEST/PACIFIC DIVISIONS:

☐ 201 E. Carpenter Freeway
P.O. Box 619200
Dallas/Ft. Worth Airport
TX 75261
Phone: 214-556-1100

☐

☐ RepublicBank Center
700 Louisiana St.
Houston, TX 77002
Phone: 713-228-9551

☐

☐ 10850 Wilshire Blvd.
Los Angeles, CA 90024
Phone: 213-879-1800

☐ 1100 Glendon Ave., Ste. 715
Los Angeles, CA 90024
Phone: 213-208-0220

Purchase Order No. 131367

Date _____ Job Number _____

To:

Principal _____

Est. Number _____ Prod. Code _____

NOTICE: Please list purchase order number, job number and principal on all invoices. Submit invoices in triplicate with a copy of this purchase order. Under standard procedures, your invoice covering this purchase, if received by the 20th of the month and found to be in order, will be paid on the 20th of the following month. SUPPLIER'S DEPOSIT OF BOZELL, JACOBS, KENYON & ECKHARDT, INC.'S PAYMENT HEREUNDER SHALL CONSTITUTE ACCEPTANCE BY SUPPLIER OF ALL TERMS AND CONDITIONS CONTAINED HEREIN AND ON THE REVERSE SIDE HEREOF.

You are authorized to supply the following:

Delivery and/or shipping instructions

Due Date _____

Estimated Cost _____

Ordered By _____

This block for internal agency use

Invoice Number _____ Date Invoice Received _____

Invoice Amount _____ Date Invoice Approved _____

D-5

General Specifications

1. For the purpose of this order and in the event that the work which is the subject of this order is copyrightable subject matter, Supplier and Bozell, Jacobs, Kenyon & Eckhardt, Inc., hereby agree that the material shall be a work made for hire and the property of Bozell, Jacobs, Kenyon & Eckhardt, Inc., as agents for the within named principal. In the event that the material which is the subject of this order is not copyrightable subject matter, or for any reason is determined not to be a work made for hire, then and in such event Supplier hereby grants all right, title and interest to said material to Bozell, Jacobs, Kenyon & Eckhardt, Inc., as agent for their within named principal.

2. The rights herein obtained, include, but are not limited to: (a) the right to use, publish, display or reproduce such material in advertising and for the purpose of trade; (b) the right to alter, retouch, or crop such material; (c) the right to secure copyright therein anywhere throughout the world; (d) the right to license, exploit, sell, assign, or otherwise dispose of such material or any of the said rights included herein for any purpose which Bozell, Jacobs, Kenyon & Eckhardt, Inc., its within named principal and their assigns and licensees may see fit; and (e) any and all subsidiary rights therein.

3. Supplier hereby represents and warrants: (a) that no third party has any rights in, to, or arising out of, or in connection with the material supplied hereunder or the rights granted herein, and that Bozell, Jacobs, Kenyon & Eckhardt, Inc., its within named principal, their assigns and licensees, shall be free from all claims for fees, royalties or other payments, or from all persons asserting any rights in, to, arising out of, or in connection with such material or right; (b) that Supplier has full right and power to enter into this agreement; (c) that all models and any other living persons whose likeness or name is used in the material supplied, and the owners of any unique or unusual inanimate objects, which are used and identifiable in the material supplied, have each and all executed valid and adequate releases permitting the use thereof for the purpose of advertising or trade and that before or at the time specified on the face of this order for the delivery of the material covered by this order, Supplier shall provide Bozell, Jacobs, Kenyon & Eckhardt, Inc. with a copy of the said releases; (d) that any and all materials which are incorporated in the materials supplied hereunder are works made for hire and free from reversion or any rights therein.

4. Supplier agrees to hold Bozell, Jacobs, Kenyon & Eckhardt, Inc., its within named principal and their assigns, and licensees, harmless from and against any loss, damage or expense, including court costs and reasonable attorney's fees, that Bozell, Jacobs, Kenyon & Eckhardt, Inc., its within named principal, and their assigns and licensees may suffer or incur as a result of any breach or alleged breach of the foregoing warranties.

5. The terms and conditions set forth herein constitute the entire agreement between the parties with respect to the materials or work to be performed pursuant to this order, and said terms and conditions cannot be modified or amended except by agreement in writing, signed by parties herein. Not withstanding the payment thereof, invoices or other similar documents originating with Supplier or its agents, shall not satisfy the requirements of the preceding sentence.

6. In the performance of the work and the production of the materials covered by this order, Supplier will comply with the Fair Labor Standards Act of 1938, as amended, and all other applicable provisions of law.

7. The order may be cancelled by Bozell, Jacobs, Kenyon & Eckhardt, Inc. at any time prior to its acceptance of the material or work covered by this order, upon written notice to Supplier. In such event, Bozell, Jacobs, Kenyon & Eckhardt, Inc. shall be liable to pay Supplier, in lieu of the price specified on the face of this order, the direct costs incurred by Supplier in the performance of its obligations hereunder prior to such cancellation, provided, however, that the amount of such costs, shall not exceed the price specified on the face of this order.

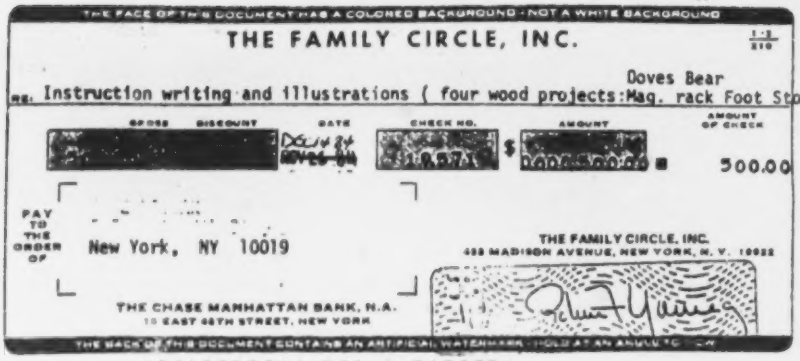
8. This order, or any sums payable hereunder, may not be assigned by Supplier without the prior written consent of Bozell, Jacobs, Kenyon & Eckhardt, Inc.

9. Timely delivery is of the essence.

10. All materials supplied hereunder must comply with Bozell, Jacobs, Kenyon & Eckhardt, Inc. specifications and are subject to its approval.

D-5

BEST AVAILABLE COPY


THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND - NOT A WHITE BACKGROUND

THE FAMILY CIRCLE, INC.

1-1
210

Doves Bear
re: Instruction writing and illustrations (four wood projects: Mag. rack Foot Stoo

GROSS	DISCOUNT	DATE	CHECK NO.	AMOUNT	AMOUNT OF CHECK
[redacted]		[redacted]	[redacted]	$ [redacted]	500.00

PAY TO THE ORDER OF New York, NY 10019

THE FAMILY CIRCLE, INC.
488 MADISON AVENUE, NEW YORK, N. Y. 10022

THE CHASE MANHATTAN BANK, N.A.
10 EAST 48TH STREET, NEW YORK

THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATERMARK - HOLD AT AN ANGLE TO VIEW

⑈021000021⑈ 023-1-019258⑈

[redacted]

Personal endorsement required.
Check void if this endorsement altered.
This check accepted as payment in full for
rights in material described on face of
check as work made for hire. AR

[redacted]

Legend on
Reverse of Check

THE NATION'S NEWSPAPER

USA TODAY

VIA SATELLITE

USA TODAY
P.O. BOX 500
WASHINGTON, DC 20044

GANNETT

March 28, 1988

[redacted]

[redacted]

USA TODAY will pay for original stories and other work upon acceptance for publication in USA TODAY in accordance with guidelines provided by your assigning editor. The amount will be full payment for the rights described below for an accepted work. Additional expenses or payments must be approved in advance by the assigning editor.

In return for the payment described, you agree that your work shall be a work made for hire and that this letter transfers to USA TODAY and its affiliated coporations all copyrights in your work throughout the world. Gannett CO., Inc. and its affiliated operations and licensees will have worldwide exclusive publishing rights to the material you write pursuant to this Agreement. This means, for example, that if USA TODAY chooses not to publish the material, and, in such event, you shall not be entitled to any additional payment. Our rights also include the rights to edit your original work or to change it in the normal editorial process. Copies of work submitted become the property of USA TODAY and will not be returned unless expressly agreed.

You assure USA TODAY that the work is your original work, of which you have sole ownership, that it has not previously been published and that we will not violate any copyright or other right of any third party.

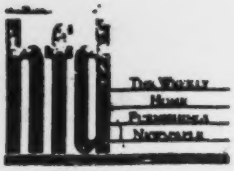
When you return the enclosed copy of this letter to Dick Sproul, Editorial Office Manager, it will enable us to begin paying you with checks identifying the works for which you are being paid.

Please sign and return this letter to confirm our understanding. Upon receipt of the signed copy, your next payment will be forwarded.

AGREED TO:

Signature _____ Date _____

D-7



28 July 1989

Fairchild Publications requests from all Photographers as per Copyright Law to sign the attached contract, to cover all future assignements. Please sign the attached and return to me as soon as poss. Looking forward to working with you in the near future.

Best regards

Moumtaz Joukhadar
HFD-Art Director

FAIRCHILD PUBLICATIONS
7 E. 12 S., N.Y., N.Y. 10003 • Tel. 741-4000

Date: _____

You hereby agree that all photographs taken by you at any time for Fairchild Publications shall be deemed works for hire for Fairchild Publications under the copyright laws of the United States.

You further agree that Fairchild Publications shall be the owner of the copyright and all other rights in such photographs, including ownership of the original negatives and you hereby assign all such rights to Fairchild Publications.

You may retain one print of each photograph for portfolio purposes only.

ACCEPTED AND AGREED:

_____

Print Name: _____

Address: _____

Phone # _____

Social Security # _____

AGREEMENT

Dear Sir:

As a condition of your providing creative services for Anheuser-Busch, Incorporated ("Company"), you agree that all creative works, including preliminary works, generated by the performance of your services ("Work") are supplementary works and shall be considered works made for hire within the meaning of the United States Copyright Act. All negatives, proofs, acetates, photographs, sketches and any other graphic material for the Work, whether preliminary or in partial or final form, shall be the exclusive property of the Company, and you assign all right, title and interest therein and to the Work to the Company for all countries of the world.

Furthermore, in view of the confidential and proprietary nature of certain of the materials and processes that you will be depicting, we require that you make every reasonable effort to maintain the photographs, proofs, negatives, acetates, sketches, etc. in confidence before the Company's publication of the Work and not use them for your own benefit or disclose them to any third party without the prior written consent of a duly authorized representative of the Company.

Notwithstanding the foregoing, you agree that you will otherwise perform your services as an independent contractor and not as an employee of the Company. The Company shall not be responsible for the health, safety, property of or liability to third parties by you or any person or employee used or employed by you in performing your services to the Company.

In the event of any inconsistency between the above obligations and any obligation in any other agreement between you and the Company, the obligations contained herein shall be controlling.

Yours truly,

ANHEUSER-BUSCH, INCORPORATED

By_____
(Name)

_____
(Title)

The foregoing is accepted and agreed to on behalf of:

_____
(Name of Company)

By_____
(Officer or Individual If Not a Company)

Date:_____

11058 D-9

AGREEMENT TO PROVIDE PHOTOGRAPHIC SERVICES

DATE: 9/8/86

IBM may wish to obtain quotations from and/or issue to Photographer IBM purchase orders and /or contracts for photographic services.

1.0 In consideration of the payments set forth in individual purchase orders, photographer agrees that all deliverable items, (including color transparencies, prints, negatives, etc.) shall be the exclusive property of IBM. Such purchase orders shall constitute the only authorization for photographer to take any action or to expend any money.

Photographer also agrees that the photography and all component elements thereof, including, but not limited to, any color transparencies, negatives and prints, shall belong to IBM and shall be deemed to be works made for hire. To the extent that the photography or any component element may not, by operation of law, be a work made for hire, photographer hereby assigns to IBM the entire ownership of copyrights in said photography and all components thereof.

2.0 The foregoing terms and conditions are in addition to terms and conditions on the back of individual IBM purchase orders which together form the exclusive agreement relating to services provided hereunder.

3.0 Photographer may cancel this agreement at any time upon written notification to IBM Purchasing.

4.0 The rights and obligations of sections 1.0 and 2.0 shall survive for any purchase order issued prior to cancellation of this agreement.

ACKNOWLEDGED:

BY:_____

TITLE:_____

DATE:_____

Please sign and return one copy to:

IBM Corporation
P.O. Box 2150
Atlanta, GA 30055

ATTN: S.M. Tanner/Purchasing

This agreement is made on this 5th day of June , 198 , by and between (hereinafter referred to as the "Independent Contractor") and Dialogue Systems, Inc., (hereinafter referred to as the "Corporation").

Whereas the Independent Contractor desires to provide services to the Corporation on an assignment basis;

Whereas, the corporation is desirous of engaging the Independent Contractor to perform such services as it requires from time to time;

Now, therefore, in consideration of the foregoing, of the mutual promises herein set forth and of other good and valuable consideration, the parties hereto, intending to be legally bound, hereby agree as follows:

1. The Corporation does hereby engage the Independent Contractor with respect to the matters specified and for the compensation indicated in Exhibit 'A' hereof.

2. The Independent Contractor hereby agrees to undertake the services indicated in Exhibit 'A' for the Corporation.

3. The Corporation hereby covenants and agrees to pay the Independent Contractor on the day of each month pursuant to an invoice to be presented to the Corporation for work completed for the preceding period. Such payment shall be subject to approval by the Corporation's authorized agent certifying that the work has been completed in a satisfactory manner.

4. The Term of this agreement shall commence as of the date hereof and may be terminated at any time by either party on written or verbal notice.

5. The Independent Contractor shall at all times be engaged in the status of independent contractor hereunder, rather than a co-venturer, agent, employee, or representative of the Corporation. The Corporation hereby acknowledges that the Independent Contractor may engage directly or indirectly in other businesses. The Independent contractor hereby acknowledges that he/she holds himself/herself out as being self-employed and has the sole responsibility to pay all taxes due on any fees received from the Corporation. The Independent Contractor further acknowledges that it is not entitled to any benefits reserved for employees, including pension, health, and unemployment insurance.

6. The Independent Contractor acknowledges that the final work product must be satisfactory to and approved by the Corporation in form, quality, and content. To assist the Independent Contractor in preparation of work product that is acceptable to the Corporation, the Corporation shall be available for consultation as the Independent Contractor may reasonably request. The Independent Contractor shall undertake such assignments using his/her own resources and facilities. The Independent Contractor may use the Corporation's facilities, workspace, telephones, and supplies for the mutual convenience of both parties. Nonetheless, the Independent Contractor acknowledges and agrees that he/she is, and will remain, at all times an independent contractor with respect to furnishing any services hereunder. The Independent Contractor agrees to follow the Corporation's normal rules and regulations relating to the use of the facilities. The Corporation shall not be responsible for any property damage or personal injury

suffered by the Independent Contractor on the Corporation premises or elsewhere unless caused by the Corporation's gross negligence.

7. All work submitted hereunder shall be on a work for hire basis and becomes the exclusive property of the Corporation.

Agreed and Accepted by:

_____	_____
Independent Contractor	Address
	_____
	_____
	Social Security Number

By: _____
Authorized Agent

CHECKMARK
PROMOTION & MARKETING SERVICES

a division of
Ralston Purina Company

P.O. NUMBER	JOB NUMBER
[redacted]	[redacted]

THESE NUMBERS MUST APPEAR ON INVOICE

PURCHASE ORDER

SUPPLIER [redacted]

BRAND/CLIENT [redacted] DIVISION [redacted]

JOB DESCRIPTION/TITLE [redacted] DEPT. NO. [redacted]

WORK CATEGORY [redacted]

DATE ORDERED [redacted] DATE NEEDED [redacted] EMPLOYEE NO. [redacted]

INSTRUCTIONS

ESTIMATED COST [redacted]

SEND ORIGINAL INVOICE AND 3 COPIES TO BUYER'S ATTENTION.

LOCATION

Buyer [redacted]

Ralston Purina Company
Checkerboard Square
St. Louis, Missouri 63164

By accepting this order, Supplier agrees that the above mentioned work is done under the Work-For-Hire Provision of the 1976 Copyright Act (17 U.S.C. 101) and if not covered by the Work-For-Hire Provision, Supplier hereby assigns all rights to the work including rights acquired as a result of any sub-contracting of the aforementioned work. The work becomes the property of the Buyer without limitation, restriction or reservation of any nature or description whatsoever. Supplier agrees to furnish original or copies of necessary art or photo releases.

FNF [redacted]

SUPPLIER

D-12

HOME BOX OFFICE, INC.
1100 Avenue of the Americas
New York, New York 10036
(212) 512-1000

"REVISED"

PHOTOGRAPHERS' BUY-OUT CONTRACT

February 01, 1985

Dear Mr.

You and Home Box Office, Inc. ("HBO") have agreed that HBO may, from time to time, commission you to take photographs (the "Photographs") for use in connection with advertising, marketing, publicity and promotional materials on the following terms and conditions:

1. All photographs commissioned by HBO shall be considered "work made for hire" for HBO under the United States Copyright Law as if HBO were the author of such Photographs.

2. HBO shall be the sole and exclusive owner of all rights, title and interest in the Photographs and may make any further use, distribution or exploitation whatsoever of the Photographs, incuding, without limitation, copyrighting the Photographs, either directly or through third parties, at its sole discretion. You represent, warrant and covenant that all Photographs you supply to HBO shall be original and shall not violate the copyright or any other right of any third party.

3. Payment of the agreed upon sum for each commissioned Photograph shall be made within thirty (30) days following HBO's receipt of your invoice; provided that you have first delivered to HBO the Photographs for which payment is due (including negatives, transparencies, and/or unprocessed film where appropriate).

4. You expressly agree that you will perform your services as an independent contractor and not as an employee of HBO.

5. You shall pay any taxes and contributions required in connection with your services hereunder and shall indemnify and hold HBO harmless against the payment of any such taxes and contributions.

6. The term of this Agreement shall commence as of the date set forth above and shall continue until terminated by either party upon written notice given thirty (30) days in advance. The termination of this Agreement shall not affect the ownership or exercise by HBO of the rights granted to it hereunder or any representation, warranty or covenant made by you.

7. This agreement, when executed, shall constitute the entire understanding between the parties concerning the Photographs; shall supercede any signed by the party aginst whom such amendment is sought; and shall be construed in accordance with the laws of the State of New York.

If the foregoing accurately and completely sets forth your understanding of our agreement, please confirm by signing and promptly returning to HBO the enclosed copy of this Agreement.

Sincerely,

HOME BOX OFFICE, INC.

By: Susanna Martin

Susanna Martin,
Director, Photo Services

AGREED TO AND ACCEPTED:

_____

SS# _____ (Individual)

CURRICULUM CONCEPTS
A Dialogue Systems Company
770 Broadway
New York, New York 10003-9529
(212) 475-6500

Order Number ER 00

DESIGN, ART, PHOTOGRAPHY PURCHASE ORDER

The Artist, Artist's Representative, or Studio, _____, _____, therein called "Contractor" agrees to make for Dialogue Systems, Inc. (herein called "DSI"), as agent for the Publisher, the following designs, original artwork or photography

Book	Page(s)	Description	Total Price
ER Grade 8	p. 158	4/c full page (Girl at Desk)	$350.00
ER Grade 8	p. 160	4/c ¼ page (2 kids in Class)	$175.00
ER Grade 8	p. 162	4/c Spot (Geometry Test)	$100.00
ER Grade 8		4/c ½ page (Kids at Table in Dining Room)	$300.00
			Total $925.00

Special Instructions/Research Illustrators Guidelines enclosed.

The work as described above is due as follows:

Sketches due 9/21/87

Final ART due TO BE NOTIFIED

Payment Schedule. Bills must be submitted as follows:

$ 462.50 with Bill/Sketches

$ 462.50 with Bill/Final ART

Payments will be made within 30 days of DSI's approval of the materials submitted.

This purchase order is contingent on acceptance of the terms and conditions printed on the reverse side and must be signed by the Artist, Artist's Representative, or Studio, and DSI.

1. The Contractor represents and warrants that all work prepared under the terms of this Agreement shall be original and not violate any copyright, proprietary right, or other right.

2. All work prepared under this agreement shall be "work made for hire" as defined in Section 101 of Title 17 of the United States Code of which DSI (for the Publisher) is author-at-law and shall be the exclusive owner of all rights in the work and reproduction thereof, including all copyrights, extensions of copyrights and renewals. DSI (for the Publisher) shall, at its sole discretion, have the right to use the work in any materials or publications, including but not limited to the exclusive right to print, publish, film, display, record, broadcast, transmit, and otherwise reproduce and use the work in its original or adapted form in all languages and formats, in audio-visual form and in all other forms, media and systems including information storage and retrieval systems, or by any other process known or hereafter developed throughout the world in perpetuity. Contractor shall provide documentation establishing that the work will be prepared either by the Contractor's employees in the course of employment or pursuant to a written work-for-hire agreement between the Contractor and its individual contributors. At DSI's request, the Contractor shall execute or provide for the execution of any further documents necessary and appropriate to confirm DSI's ownership of all rights to the work.

3. The Contractor acknowledges that it has received and will generate and have access to confidential and proprietary information of DSI and the Publisher in the course of performing this Agreement. For purposes of this Agreement, such confidential information shall include all editorial content, design and design concepts, specifications of the work, the cost of the work performed, and DSI's name and/or the name of the Publisher. The Contractor agrees to hold all such information in trust and confidence and to maintain strict confidentiality regarding it.

4. The Contractor represents and warrants to DSI that the Contractor has full power and authority to enter into this Agreement.

5. Model release forms are required for all photography. DSI shall provide appropriate release forms. The Contractor shall have the release forms signed by all models, model agents, or parents or guardians in the case of a minor and deliver said forms to DSI with photography.

6. Any materials provided to the Contractor by DSI for the performance of this Agreement are and will remain the exclusive property of DSI and must be returned upon termination of this Agreement or before, if requested.

7. The Contractor will indemnify and hold harmless DSI and the Publisher from and against any and all claims, damages, fines, penalties, liabilities, costs, and expenses, including legal expenses arising out of a breach of any warranty, representation, or agreement made by the Contractor or the Contractor's employees while performing services herein. The indemnification obligation of the Contractor shall survive the expiration or termination of the Terms of this Agreement and shall continue in full force and effect.

8. This Agreement shall be governed by the laws of the State of New York.

9. All work prepared and delivered by the Contractor under the terms of this Agreement must be satisfactory to DSI and the Publisher in form, content, and quality. DSI may make a decision to accept or reject said work, and decisions shall be final and not subject to review.

10. This Agreement sets forth the entire agreement between the parties hereto. Any waiver by either party of any requirement of this Agreement shall not constitute a waiver of any other requirement of this Agreement, or of the same requirement on a separate occasion.

IN WITNESS WHEREOF We hereby sign, seal, and execute this duly authorized Agreement as of the date and year first written above.

DSI
APPROVED BY

DSI Production Manager

Date 9/17/87

DSI Designer

Date 9/17/87

CONTRACTOR

Name Title

Address

Telephone Number

X
Social Security or Tax Payer I.D. Number

X
Signature Date 9/21/87

MACMILLAN PUBLISHING COMPANY

AGREEMENT made this 15th. day of December 1988 between Macmillan Publishing Company, 866 Third Avenue, New York, N.Y. 10022 ("Publisher") and

_____ of

_____

_____ ("Contributor")

regarding services of the Contributor in respect of _____

_____ (the "Work").

Contributor is hereby commissioned to prepare the following for the Work in accordance with the Publisher's specifications:

Photography

Contributor undertakes to perform such commission as a work made for hire on behalf of the Publisher and to deliver the contribution in form and content satisfactory to the Publisher no later than January 5, 1989, time being of the essence.

As full consideration for all of the Contributor's services and for the exclusive right of the Publisher, its assignees and licensees, to use of the contribution in the Work and in any other publications or works, in all forms and media, the Publisher shall pay to the Contributor the following sum upon satisfactory completion and delivery of the contribution:

Original artwork prepared by the Contributor shall remain the physical property of the Contributor but copyright and all rights of reproduction in such artwork and in any other contribution by the Contributor in all forms and media shall at all times be the exclusive property of the Publisher.

Contributor warrants that the contribution will be the Contributor's original work, that its preparation and publication will not violate any copyright or any personal or proprietary right, and that the Contributor shall be solely responsible for obtaining any permissions required for the contribution and shall deliver such permissions in writing upon delivery of the contribution.

This constitutes the entire Agreement between the Publisher and the Contributor and supersedes any other understandings or terms, including those expressed in any invoice of the Contributor. This Agreement may not be modified except in writing signed by both parties, is entered into and delivered in the State of New York, and shall be governed by and construed in accordance with the laws of New York.

Publisher:

Macmillan Publishing Company

By: _____

Contributor:

By: _____

Taxpayer I.D. No.
or Social Security No. _____

FM-88
1088

D-15

Polaroid Confirmation/Estimate/Release Form

Expenses*	$
Assistants/Casting	
Fee/Labor	
Film & Processing Qty. Size	
Black & White	
Color	
Polaroid	
Prints	
Ground Transportation	
Cabs	
Car Rentals &/or Mileage	
Messengers	
Insurance	
Liability	
Other	
Location Search	
Fee	
Transportation	
Sets/Props/Wardrobe	
Set Design Fee	
Props	
Other	
Special Equipment/Specialist Assistance	
Hairdresser	
Make-up Artist	
Stylist	
Other	
Talent	
Adults	
Children	
Travel	
Air Fares	
Meals	
Hotels	
Miscellaneous	
Gratuities	
Shoot Meals	
Other	
Expense Total	

*Back-up receipts must accompany all expense reports

Name

Address

Date: Feb. 15, 1989

Subject: Pres. Product Shots

Art Director:

Shooting Date(s) 2/13,14,21

Our Job No.:

☒ Assignment Confirmation
☐ Job Estimate
☐ Invoice

Photography Fee(s) & Totals	$ 2475.
Principle Photography (Basic Fee)	
($ per day or photograph, if applicable)	
Description	
Qty. Size	
Space &/or Use Rate (if Higher)	
($ per photo)	
Travel &/or Prep Days (at $ - per day)	
Product or Subsidiary Photography	
($ per photograph)	
Postponement/Cancellation/Reshoot	
(% of orig. fee)	
Weather Days (at $ per day)	
Total Fee(s)	
Total Expenses (see 1st column)	$1041.09
Fee Plus Expenses	
Sales Tax (if applicable)	175.81
Total	$3691.90
Advance	
Balance Due	

Media Usage

☐ Advertising ☐ Editorial/Journalism
☐ Corporate/Industrial ☐ Promotion & Collateral
☒ Work for Hire ☐ Buy Out

X Signature Da

D-16

CONSULTING AGREEMENT

Creative Services Consultants
(Production Artists, Photographers, Editors,
Writers, Designers, Vendors, etc.)
Revision 5.18.87

This Agreement is entered into as of _____, 19__, by and between Apple Computer, Inc., 20525 Mariani Avenue, Cupertino, California 95014 ("APPLE") and

_____
("CONSULTANT")

APPLE desires to retain CONSULTANT as an independent contractor to perform consulting services for APPLE from time to time, and CONSULTANT is willing to perform such services, on the basis set forth more fully below.

In consideration of the mutual promises contained herein, APPLE and CONSULTANT agree as follows:

1. Services. CONSULTANT agrees to perform the services described in Exhibit A ("Services") in a workmanlike manner according to the schedule of work set forth in Exhibit C.

2. Payment for Services. APPLE shall pay CONSULTANT the fee as set forth in Exhibit B for the performance of the Services, together with reimbursement for CONSULTANT'S direct costs as provided in Exhibit B.

3. Term. This Agreement shall commence on the date first written above and shall continue in accordance with the schedule of work set forth in Exhibit C, unless sooner terminated in accordance with this Agreement.

4. Relationship of Parties. CONSULTANT shall perform the Services under the general direction of APPLE, but CONSULTANT shall determine, in CONSULTANT'S sole discretion, the manner and means by which the Services are accomplished, subject to the express condition that CONSULTANT shall at all times comply with applicable law, and that all work produced by CONSULTANT pursuant to the performance of the Services shall be deemed to be a work or work for hire within the meaning of the Copyright Act of 1976, Title 17, United States Code.

5. Personnel. CONSULTANT'S employees and agents shall observe the working hours, working rules, and holiday schedule of APPLE while working on APPLE'S premises. APPLE reserves the right to request the replacement of any CONSULTANT personnel assigned to perform the Services. If APPLE exercises this right, CONSULTANT shall replace the disapproved personnel as soon as is reasonably possible.

6. Employment Taxes and Benefits. CONSULTANT acknowledges and agrees that it shall be the obligation of CONSULTANT to report as income all compensation received by CONSULTANT pursuant to this Agreement, and CONSULTANT agrees to indemnify APPLE and hold it harmless to the extent of any obligation imposed on APPLE to pay any withholding taxes, social security, unemployment or disability insurance, or similar items, including interest and penalties thereon, in connection with any payments made to CONSULTANT by APPLE pursuant to this Agreement.

7. Indemnity. CONSULTANT shall indemnify APPLE and hold it harmless from and against all claims, damages, losses, and expenses, including reasonable attorneys' fees arising out of or resulting from the performance of the Services and caused by any negligent act or omission or willful conduct of CONSULTANT or CONSULTANT'S employees or agents and which are attributable to (a) any bodily injury, sickness, disease, or death; (b) any injury or destruction to tangible or intangible property (including computer programs and data) or any loss of use resulting therefrom; (c) any claims or proceedings alleging that the work or works produced by CONSULTANT pursuant to the performance of the Services infringe the copyright of another; or (d) any violation of any statute, ordinance, or regulation.

8. Insurance. CONSULTANT shall maintain insurance to protect itself from (a) claims under worker's compensation and state disability acts; (b) claims for damages because of bodily injury, sickness, disease, or

death of its employees or of any other person which arise out of any negligent act or omission of CONSULTANT or CONSULTANT'S employees or agents; and (c) claims for damages because of injury to or destruction of tangible property, including loss of use resulting therefrom, which arise out of any negligent act or omission of CONSULTANT or CONSULTANT'S employees or agents.

9. Pre-existing Obligations. CONSULTANT represents and warrants that neither CONSULTANT nor its employees or agents, if any, are under any pre-existing obligation or obligations inconsistent with the provisions of this Agreement.

10. Confidentiality. CONSULTANT shall not, either during or subsequent to the term of this Agreement, directly or indirectly divulge to any unauthorized person any information designated as confidential by APPLE, including but not limited to the Confidential Information set forth in Exhibit D, nor will CONSULTANT disclose to anyone other than an APPLE employee or use in any way, other than in the performance of this Agreement, any information regarding APPLE, including APPLE'S know-how, not known to the general public or recognized as standard practice, whether acquired or developed by CONSULTANT during CONSULTANT'S performance under this Agreement or obtained from APPLE employees, nor shall CONSULTANT, either during or subsequent to the term of this Agreement, directly or indirectly publish any such information or disclose the existence of this Agreement without the prior written consent of APPLE to do so. CONSULTANT acknowledges that the unauthorized disclosure or use of such information would cause irreparable harm and significant injury which would be difficult to ascertain and which would not be compensable by damages alone. Accordingly, CONSULTANT agrees that APPLE has the right to injunctive relief enjoining any breach of this Agreement. The foregoing restrictions shall not apply to information which (a) is known to CONSULTANT at the time of disclosure to CONSULTANT by APPLE, (b) has become publicly known through no wrongful act of CONSULTANT, (c) has been rightfully received from a third party without restriction on disclosure and without breach of this Agreement, (d) has been independently developed by CONSULTANT, (e) has been approved for release by written authorization of APPLE, (f) has been furnished by APPLE to a third party without a similar restriction on disclosure, or (g) has been disclosed pursuant to a requirement of law.

11. Solicitation of Employment. Each party agrees not to solicit the services of or employ any of the employees of the other during the term of this Agreement and for a period of six (6) months thereafter without the prior written consent of the other party.

12. Termination. Either party may terminate this Agreement immediately upon written notice to the other, with or without cause, for any reason whatsoever.

13. Apple Property. CONSULTANT shall return to APPLE property that has come into its possession during the term of this Agreement when requested by APPLE, and in any event shall do so upon termination of this Agreement unless CONSULTANT receives written authorization from APPLE to keep such property. CONSULTANT shall not remove any APPLE property from APPLE'S premises without the prior written consent of APPLE.

14. Work for Hire. CONSULTANT agrees that the work or works produced by CONSULTANT pursuant to the performance of the Services ("Work(s)") are "works for hire" within the meaning and intent of the United States Copyright Act, Title 17, United States Code, and that all right, title, and interest in and to said Work(s), including but not limited to, all drafts, models, sketches, preliminary designs, derivative works, and the like relating to or referring to the Work(s), as well as any and all copyright(s), patents, and/or trade secrets therein, shall reside solely and exclusively in APPLE. CONSULTANT warrants and represents that CONSULTANT'S creation, design, participation in, or contribution to the creation of the Work(s) is original to CONSULTANT and, to the best of CONSULTANT'S knowledge, does not infringe the copyright in any other work or wo ks of art.

APPLE shall have the right to place the Universal Notice of Copyright on the Work(s) in the name of APPLE, and shall have the further right to register its claim(s) of copyright in the Work(s), in its name, in the Copyright Offices of the United States and any and all other countries of the world.

CONSULTANT hereby assigns, transfers, grants and otherwise conveys to APPLE, all right, title and interest, including copyrights, patents, and/or trade secrets in and to the Work(s) and agrees, at the request of APPLE, to execute formal documents of Assignment in and to each and every one of the Work(s) and/or, at the request and expense of APPLE, any other documentation as may be necessary or required to enable

APPLE to register and record its claim(s) of copyright and/or patents in and to the Work(s) in the United States and any and all other countries of the world. CONSULTANT further acknowledges and agrees that the obligation to assign over the Work(s) to APPLE shall survive the termination of this Agreement.

CONSULTANT agrees that APPLE shall have the right to use the Work(s) for any purpose of whatsoever nature or kind.

15 Effect of Termination. Upon termination of this Agreement for any reason, each party shall be released from all obligations and liabilities to the other occurring or arising after the date of such termination, except that any termination of this Agreement shall not relieve CONSULTANT of CONSULTANT'S obligations under Paragraphs 6, 7, 10, 11, 13 and 14 hereof, nor shall any such termination relieve CONSULTANT or APPLE from any liability arising from any breach of this Agreement.

16 Assignment. The rights and liabilities of the parties hereto shall bind and inure to the benefit of their respective successors, executors, and administrators, as the case may be; provided that, as APPLE has specifically contracted for CONSULTANT'S services, CONSULTANT may not assign or delegate its obligations under this Agreement either in whole or in part without the prior written consent of Apple.

17 Equitable Relief. Because the Services are personal and unique and because CONSULTANT shall have access to and become acquainted with the Confidential Information of APPLE, CONSULTANT agrees that APPLE shall have the right to enforce this Agreement and any of its provisions by injunction, specific performance, or other equitable relief without prejudice to any other rights and remedies that APPLE may have for a breach of this Agreement.

18 Attorneys' Fees. If any action at law or in equity is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees, costs, and expenses, in addition to any other relief to which such prevailing party may be entitled.

19 Governing Law; Severability. This Agreement shall be governed by and construed in accordance with the laws of the State of California. If any provision of this Agreement is for any reason found by a court of competent jurisdiction to be unenforceable, the remainder of this Agreement shall continue in full force and effect.

20 Complete Understanding; Modification. This Agreement constitutes the full and complete understanding and agreement of the parties hereto and supersedes all prior understandings and agreements. Any waiver, modification or amendment of any provision of this Agreement shall be effective only if in writing and signed by the parties hereto.

21 Notices. Any notices required or permitted hereunder shall be given to the appropriate party at the address specified below or at such other address as the party shall specify in writing. Such notice shall be deemed given upon personal delivery to the appropriate address or sent by certified or registered mail, three days after the date of mailing.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement as of the date first written above.

APPLE	CONSULTANT
Signature:_____	Signature:_____
Please print: Name:_____	Please print: Name:_____
Title:_____	Address:_____
Apple Computer, Inc. Mariani Avenue Cupertino, CA 95014	_____ Business Phone: (___) _____ Tax ID No. _____ (or Social Security Number)

EXHIBIT A

TO CONSULTING AGREEMENT

SERVICES

(Check and initial as appropriate):

_____ [] 1. Continuing Services by CONSULTANT: CONSULTANT shall render such Services as APPLE may from time to time request in writing in connection with:

[] a. All phases of Graphic Art Production
[] b. All phases of Graphic Design
[] c. All phases of Photography
[] d. All phases of Copywriting
[] e. All phases of Editing
[] f. Other: _____
_____
_____

_____ [] 2. Single Project Only: CONSULTANT shall render the following Services to APPLE:

_____
_____
_____
_____
_____
_____

EXHIBIT B

TO CONSULTING AGREEMENT

CONSULTANT'S FEES AND REIMBURSEMENT

CONSULTANT shall receive the following fees(s) for its Services rendered pursuant to this Agreement:

(check and initial as appropriate):

_____[] $_____ per written work order submitted by APPLE in accordance with Exhibit A 1.

_____[] $_____ in full payment of the Services rendered pursuant to Exhibit A 2.

_____[] Reimbursement of CONSULTANT's direct costs, in accordance with APPLE's normal accounts payable procedure, upon receipt by APPLE of an itemized statement of said costs, in writing, from CONSULTANT, to a maximum of $_____.

BROADCAST engineering

the journal of broadcast technology

P.O. Box 12901 • Overland Park, Kansas 66212 U.S.A. • 913-888-4664 • TELEX 42-4156 INTERTEC OLPK

[redacted]

This is to confirm our understanding that you have been employed and commissioned by Intertec to prepare material suitable for Intertec's use and identified as follows:

[redacted]

You acknowledge that all material will be prepared by you and that all materials prepared or to be prepared shall be considered as a "Work Made for Hire" as that term is defined in Section 101 of the U.S. Copyright Law.

You represent and warrant that you are the author of the material, that it is original, that it does not infringe upon copyright or any other right whatsoever and that it contains no other matter contrary to law and that you are the sole owner of the rights herein conveyed and that such rights are herein free and clear.

Intertec shall be the proprietor of all the material prepared by you pursuant to this letter agreement including all primary, subsidiary, related and unrelated rights thereto. Intertec shall exclusively own and control all rights therein and thereto including, but not limited to, all copyright and trademark rights.

Notwithstanding the foregoing, you irrevocably assign to Intertec any rights you may have in the material, and any of its subsidiary, ancillary and other uses, including, but not limited to, copyright and trademark rights in and to the same.

As compensation, Intertec agrees to pay you $ #152.00 for the material to be prepared by you, the form and content of which is to be satisfactory to Intertec and ~~to be submitted by you by the _____ day of _____~~. This payment will be the entire compensation for your services.

You acknowledge that this agreement may be recorded by Intertec pursuant to the U.S. Copyright Law.

Acknowledged and agreed to
this _____ day of _____, ___.

BY _____

Social Security # _____

Please sign, date and return
original copy of this letter.

Very truly yours,

INTERTEC PUBLISHING CORP.

BY _____
Bill Rhodes
Editorial Director

Houghton Mifflin Company

One Beacon Street, Boston, Massachusetts 02107
(617) 725-5000 Cable HOUGHTON

School Division

Dear

This letter of agreement commissions you to prepare and deliver to Houghton Mifflin Company four 35mm transparencies per our specifications for Willcutt. (the "Work") in accordance with the terms and conditions of our Purchase Order # _____, and the enclosed Assignment Photography Contract.

The work to be prepared by you shall be considered a work made for hire to the extent permitted by the copyright law of the United States, and all rights of ownership and authorship in the work throughout the world shall vest in Houghton Mifflin Company.

This agreement is made with the understanding that the material you prepare will not infringe on any copyright or personal or proprietary rights of others.

We will pay you a fee of $_____ upon satisfactory completion of the work.

We will give customary and appropriate credit for your materials in the Work in which it appears, and we shall have the right to use your name and to reproduce your material in the advertising and promotion of the Work. Your original work submitted will become the property of Houghton Mifflin Company.

Since it is necessary to have fully signed copies of this agreement prior to beginning your work, please sign and return one copy of this letter in the enclosed envelope before proceeding with this assignment.

Sincerely,

_____
for Houghton Mifflin Company

_____
Accepted

*up to maximum of $1,250.00

TO: _____

COPYRIGHT RELEASE AGREEMENT

This letter agreement confirms the relationship between Westinghouse Electric Corporation (Westinghouse) and you whereby you have been engaged by Westinghouse to _____ during the time period _____ through _____. The parties hereby agree that all material of any kind prepared by you for Westinghouse during such period will be used in Westinghouse publications or for any other purpose decided by Westinghouse.

You further agree that you and your licensees, successors, or assigns shall not acquire claims or rights to the copyright to any work product provided by you under this agreement. Such work product shall include, but is not limited to, all photographs, prints, negatives, transparencies, written text, whether technical or otherwise, drawings, pictures, etc. It is understood that Westinghouse is the sole owner of the work products prepared by you under this agreement and Westinghouse is the sole owner of all copyrights therein and that such work product shall be considered as works for hire created for the benefit of Westinghouse.

Please indicate your acceptance of the terms of this agreement by dating and signing both copies of this document in the space provided below. One copy of the agreement should be kept by you.

WESTINGHOUSE ELECTRIC CORPORATION

By: _____

ACCEPTED and agreed to this _____ day of _____, _____.

By: _____
(Name of Outside Vendor)

A-48159
Rev. 9-81

E. I. DU PONT DE NEMOURS & COMPANY (INC.)
WILMINGTON, DE 19898

Estimate No. LOPH 74303
Purchaser's Name _____
Purchaser's Job No. E _____
Req'd Delivery Date _____
Supplier's Job No. _____
Supplier's Terms: Net 30, _____% _____ Days
Supplier's Code No. _____
Supplier's Tax ID # or S.S. # _____

MARKETING COMMUNICATIONS DEPT. CREATIVE SERVICES ESTIMATE

This detailed estimate (due with the layout) becomes our order as specified, subject to conditions and instructions listed below and on reverse side, when signed by our authorized representative. (For jobs expected to exceed $5,000, a preliminary estimate, in letter form, is required prior to the start of any work.)

JOB TITLE and DESCRIPTION:

SUPPLIER'S NAME and ADDRESS:

CATEGORY: (Check one only)

CODE		CODE		CODE		CODE	
10 ☐	Ad	35 ☐	Brochure (9-39pp)	40 ☐	Folder/Mailer 1-4pp)	60 ☐	Packaging
15 ☐	Binder	30 ☐	Direct Resp. Cards	45 ☐	Invitation/Announce.	65 ☐	Presentation
20 ☐	Book (32pp +)	25 ☐	Display/Signs	50 ☐	Label/Masthead	70 ☐	Price/Data Sheet

CODE	
75 ☐	Slides/Vuegraphs
80 ☐	Product Publicity
90 ☐	Other _____

Estimate to Client at time time

	SERVICES	NO. OF UNITS	CODE	ESTIMATED COST	ACTUAL COST
COPY	PROMOTIONAL WRITING / Typewritten page		110	$	$
	TECHNICAL WRITING / Typewritten page		120		
	REWRITING / EDITING /Typewritten page		130		
LAYOUT	ROUGH (Includes design time) / Page		210		
	COMPREHENSIVE / Page		220		
FINISHED ART	ILLUSTRATION / Item		310		
	TECHNICAL DRAWING / Item		320		
	FASHION ILLUSTRATION / Item		330		
	LOGO DESIGN / Item		335		
	DECORATIVE ART / Item		340		
	CARTOONING / Item		360		
	CHART LETTERING / Page		370		
PHOTOGRAPHY	ORIGINAL STUDIO /Assignment Day		415		
	ORIGINAL LOCATION / Assignment Day		435		
	STOCK PHOTOGRAPHY		440		
	RETOUCH / Item		460		
	MODELS (Two copies of Model Release req'd.)		480		
	EXPENSES (attach list of detail)		470		
MECHANICAL SERVICES	TYPESETTING—IN HOUSE / Type Set Page		530		
	—PURCHASED / Type Set Page		540		
	MECHANICAL (Includes makeup, stats) / Page		580		
	FILM MECHANICAL / Page		590		
SLIDES/ VUEGRAPHS (Total Cost)	ORIGINAL COPY SLIDES / Item		600		
	ORIGINAL TABLE CHART SLIDES / Item		610		
	ORIGINAL GRAPH / BAR CHART SLIDES / Item		615		
	ORIGINAL ILLUSTRATION SLIDES / Item		620		
	ORIGINAL PHOTO SLIDES / Item		630		
	PICK UP ART SLIDES / Item		635		
	DUPLICATE SLIDES / Item		640		
DUPLICATIONS	PHOTO PRINTS, STATS, FILM / Item		650		
OTHER (Describe in detail)			900		

TOTALS $ _____ $ _____

*EXPLAIN OVERRUN

Gen'l. Ledger	Sub Accounts	% Distrib
3621		

RIGHTS OF OWNERSHIP

SERVICES/MATERIALS PURCHASED HEREUNDER SHALL BE "WORK FOR HIRE" UNDER THE COPYRIGHT LAWS. Supplier hereby sells, transfers and assigns to E. I. du Pont de Nemours and Co. (Inc.) full and exclusive property rights in the materials, work or service purchased hereunder including, but not limited to, all copyright interest, all foreign and domestic literary, artistic and industrial property rights, and all reproduction rights. Supplier warrants that it has full right to sell, transfer and assign the material, work or service and that same may be used or reproduced without violating any laws or the rights of any third parties. THE SIGNED ACKNOWLEDGEMENT OF THIS PURCHASE ORDER MUST BE RETURNED TO DU PONT CO. MCD ACCOUNTING SECTION BEFORE ANY INVOICE CAN BE PAID.

Supplier Representative's Signature _____ Date _____

Purchaser's Signature _____

Approved by (Signature) _____

D-21

MCD ACCOUNTING

IBM INTERNATIONAL BUSINESS MACHINES CORPORATION

NATIONAL MARKETING DIVISION
P.O. BOX 2150
ATLANTA, GEORGIA, U.S.A. 30055

PURCHASE ORDER

Confirming Only

PURCHASE ORDER NUMBER
~~L C W 3 4 0 6 M~~
154484

SHOW OUR COMPLETE ORDER NO. & ITEM NO. ON ALL INVOICES & PACKING LISTS

SUPPLIER NO
70567

DATE 09/06/85

INVOICES TO: IBM CORPORATION
CALL BOX #125
ROCHESTER, MN 55903

TRANSPORTATION ROUTING GUIDELINES
(Do not insure or declare value)
0 - 99 lbs. (45 kg.) United Parcel Service. Use if available.
0 - 40 lbs. (18 kg.) Parcel Post (Zones 1-8) up to $1000 value.
All other — Ship as indicated in "ship via" block.

F.O.B.	TERMS OF PAYMENT	SHIP VIA
SHIP PUBLIC COLLECT	NET 30 DAYS FROM RCPT OF INV	

PART NUMBER / DESCRIPTION	QUANTITY	SHIP ON THIS DATE	PRICE
PHOTOGRAPHIC SERVICES: PHOTOGRAPHY FOR BANK SYSTEMS & EQUIPMENT COVER SEPT. ISSUE. PROJECT COORDINATED BY ALAN HODEL IBM-ATLANTA	1 LT	N/A	ADVISE LT

TOTAL $ .00

SUBMIT YOUR PRICE INFORMATION TO THE BUYER LISTED BELOW BEFORE INVOICING.

IN CONSIDERATION OF THE PAYMENTS SET FORTH ABOVE FOR THIS ASSIGNMENT, PHOTOGRAPHER AGREES THAT THE PHOTOGRAPHY & ALL COMPONENT ELEMENTS THEREOF, INCLUDING BUT NOT LIMITED TO ANY COLOR TRANSPARENCIES, NEGATIVES/PRINTS, SHALL BELONG EXCLUSIVELY TO IBM & SHALL BE DEEMED TO BE WORKS MADE FOR HIRE. TO THE EXTENT THAT THE PHOTOGRAPHY OR ANY COMPONENT ELEMENT MAY NOT, BY OPERATION OF LAW, BE A WORK MADE FOR HIRE, PHOTOGRAPHER HEREBY ASSIGNS TO IBM THE ENTIRE OWNERSHIP OF COPYRIGHTS IN SAID PHOTOGRAPH & ALL COMPONENT ELEMENTS THEREOF.

See the attached

CONFIRMING ORDER, DO NOT DUPLICATE.

FLORIDA SALES/USE TAX DEALER REGISTRATION 60-44-22178-31
GEORGIA SALES/USE TAX DIRECT PAY PERMIT #080-79-5408S
MINNESOTA SALES/USE TAX DIRECT PAY PERMIT NUMBER DP-1009

SUBJECT TO THE TERMS AND CONDITIONS ON THE BACK HEREOF WHICH ARE INCORPORATED AND MADE A PART HEREOF

SHIPPING CARTONS ARE NOT TO EXCEED 50 POUNDS GROSS WEIGHT UNLESS PALLETIZED.

PLEASE INDICATE FINAL SHIPMENT ON YOUR PACKING LIST WHEN AN ORDER IS COMPLETED.

CERTIFIED FOR NATIONAL DEFENSE UNDER DMS REGULATION 1

You are required to follow the provisions of DMS Regulation 1 and of all other applicable regulations and orders of BDC in obtaining controlled materials and other products and materials needed to fill this order, provided it contains a DO and/or DX priority rating.

921 1534 28

INTERNATIONAL BUSINESS MACHINES CORPORATION

PAGE 1 — TV JONES J.V. Jones
ATLANTA, GEORGIA

PHONE 1-404-238-4852 J.V.J. BUYER 15

D-22

STANDARD TERMS AND CONDITIONS

IBM EXPRESSLY LIMITS ACCEPTANCE TO THE TERMS STATED ON BOTH SIDES OF THIS PURCHASE ORDER AND ANY ATTACHMENTS

AGREEMENT DOCUMENTS This Purchase Order and any attachments are the complete agreement between IBM and Seller. No other document, including Seller's proposal quotation and acknowledgment forms, shall be part of this agreement, even if referred to unless specifically agreed to by IBM in writing. No right that IBM has regarding this agreement may be waived or modified except by IBM in writing.

PRICE If price is not stated on this agreement, Seller shall invoice at lowest prevailing market price.

TAXES Seller shall pay all sales and use taxes unless otherwise agreed in writing.

TERMS OF PAYMENT Terms of payment and discount arrangements shown on face must appear in this agreement. Calculations shall be from the date IBM receives an accepted [illegible]

PACKAGES Packages must bear IBM [illegible] and show quantities of gross and net weights.

TRANSPORTATION Regular — At rate used in transportation [illegible] applies on the face of this order.
F.O.B. — unless otherwise specified, title and risk pass F.O.B. origin.
Prepaid Transportation when specified — Freight must be collected on a paid freight bill or equivalent.
Cartage
Premium Transportation — No charge allowed unless authorized by IBM.
Insurance
Consolidation — Unless otherwise instructed, consolidate all daily shipments to one destination on one bill of lading.

LATE SHIPMENT If Seller fails to ship on time, IBM may purchase elsewhere and may, unless Seller's delay was due to unforeseeable causes beyond its control and without [illegible] fault or negligence, charge Seller with all losses incurred.

INSPECTION OF GOODS IBM may inspect the goods within a reasonable time after delivery. IBM may return nonconforming goods to Seller at Seller's risk and expense. Payment shall not constitute an acceptance of the goods nor impair IBM's right to inspect or any of its remedies.

PARTS PROVIDED BY IBM If IBM provides parts for use by Seller to perform work under this agreement, Seller shall use such parts solely for that purpose.

TOOLS Seller shall [illegible] and [illegible] all of its [illegible] unless otherwise agreed. Seller shall use IBM owned tools only for work performed for IBM.

SUBCONTRACTING Seller shall not subcontract [illegible] work to be performed under this agreement without IBM's consent in writing. Seller may purchase [illegible] standard commercial [illegible]

PUBLICITY Seller shall not without [illegible] IBM's consent in writing advertise or otherwise disclose the fact that Seller has contracted to furnish [illegible] under this agreement.

CONFIDENTIAL INFORMATION [illegible] this agreement or disclose to any person [illegible] in connection with this agreement [illegible] IBM Seller [illegible] Seller's [illegible] parties [illegible] IBM Seller [illegible]

All [illegible] IBM [illegible] Seller [illegible] received from IBM [illegible] Seller [illegible]

Seller [illegible] contained [illegible] Seller [illegible] IBM [illegible] IBM [illegible] Seller [illegible] IBM [illegible] Seller [illegible] IBM [illegible] Seller

PURCHASE ORDER #: _____

GENERAL TERMS

Photographic services shall be performed to the satisfaction of the requestor, who is the IBM Coordinator for this assignment.

Compensation for this assignment shall be $_____ per day.

In addition to the foregoing, reasonable and actual expenses of travel shall be paid in accordance with the attached reimbursement policy.

All deliverable items, (including color transparencies, prints, negatives, etc.) shall be the property of IBM.

In consideration of the payments set forth above for this assignment, photographer agrees that the photography and all component elements thereof, including, but not limited to any color transparencies, negatives and prints, shall belong to IBM and shall be deemed to be works made for hire. To the extent that the photography or any compenent element may not, by operation of law, be a work made for hire, photographer hereby assigns to IBM the entire ownership of copyrights in said photography and all components thereof.

ACKNOWLEDGEMENT:

BY: _____

TITLE: _____

Please sign and return one copy prior to start date to:

9/10/85

IBM Corporation
P.O. Box 2150
Atlanta, GA 30055

Attn: TAFT V. JONES
92D 2D-12

Please Sign & Return
ASAP

Thanks,
Taft

TERMS AND CONDITIONS

TRAVEL AND LIVING

While performing work under this Agreement/Purchase Order, the following guidelines shall be incorporated:

Travel and Living Expenses

IBM shall reimburse Contractor for all reasonable travel and living expenses authorized by IBM and incurred in connection with services furnished under this Agreement/Purchase Order. All travel and living expenses shall be in accordance with the following.

For trips made in conjunction with this Agreement/Purchase Order, IBM will reimburse costs incurred as follows:

° Transportation

- Tourist class air fare will be reimbursed upon presentation of airline ticket.
- First class air fare will not be reimbursed unless approved by IBM in advance.
- Air travel will be reimbursed only for that portion which is directly related to the IBM assignment.
- Ground transportation will be reimbursed, be it taxi, bus or car rental. A car rental agreement, however, will be required for reimbursement. Included herewith are tolls, tips, parking fees, and gas receipts.
- When using your personal automobile in conjunction with IBM work at your home city location, reimbursement will be at the rate of 20.5 cents per mile. The Contractor has the responsibility to maintain a "Weekly Mileage Log" which will be submitted as an attachment to the invoice.

° Lodging and Meals

IBM will reimburse lodging upon presentation of the hotel/motel bill.

° Personal Expenses

IBM will not reimburse personal expenses. If expenses of a personal nature (i.e., hotel shop purchases, alcoholic beverages, sundry items, etc.) are charged against the room, the amount will be deducted from the invoice presented to IBM. Contractors are expected to take care of all incidentals before departure (laundry, valet, telephone calls, etc.)

Business calls made on behalf of IBM will be reimbursed.

Gratuities: IBM will reimburse reasonable tipping.

INVOICES TO IBM

Contractor will submit invoices to IBM for the services furnished and travel and living expenses incurred hereunder. After receipt of an acceprable invoice, IBM shall make payment to Contractor within the terms specified in the subject Purchase Order.

It should be noted that an acceptable invoice is one that has the Agreement/Purchase Order number identified and all supporting documentation attached, and is arithmetically correct.

All invoices will be addressed to the IBM Corporation and forwarded to IBM Accounts Payable, Call Box 4125, Rochester, Minnesota 55903. A copy of the invoice should be sent to the undersigned buyer. Each invoice will identify:

- Purchase Order number
- An invoice number
- A statement of service
- Fees associated thereto
- All applicable receipts for reimbursement (hotel, airline ticket, car rental contract, etc.)
- Payment terms (i.e., net 30, etc.)

Attachment E

A1

APPENDIX

MEMBERS OF THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION

3M
AMP Incorporated
Amdahl Corporation
Apple Computer, Inc.
AT&T
Bell & Howell
Compaq Computer Corporation
Control Data Corporation
Cummins-Allison Corporation
Dictaphone Corporation
Digital Equipment Corporation
Eastman Kodak Company
Epson America, Inc.
Fujitsu America, Inc.
Harris/Lanier
Hewlett-Packard Company
Hitachi Computer Products (America), Inc.
Honeywell Bull Inc.
Honeywell Keyboard Division
IBM Corporation
ICL, Inc.
Information Handling Services
Multigraphics, a Division of AM International, Inc.
NCR Corporation
Panasonic Industrial Company
Philips Business Systems, Inc.
Prime Computer, Inc.
Sony Corporation of America
Tandem Computers Incorporated
Tektronix, Inc.
Telxon Corporation
Texas Instruments Incorporated
Xerox Corporation

A2

MEMBERS OF THE INFORMATION INDUSTRY ASSOCIATION

ABC-CLIO
Abt Associates Inc.
Abt Books, Inc.
Academic Press, Inc. (H/B/J)
Accel Partners
Access Publishing Company
Peter Adams & Associates
ADP Financial Information Services
Advanced System Design, Inc.
Advanced Technology Resource
Advertising Research Corporation
Age Marketing (Equifax)
Agenda Technology
AIRDATA, INC.
Alex. Brown & Sons Inc.
AMERICAN BANKER-Bond Buyer (ITOL)
American Communications & Engineering, Inc.
AMERICAN CONNECTION, INC.
American Express Strategic Bus. Sys. Gp.
American International Communications
American Stock Exchange Clearing Corp.
American Stock Exchange International, NV
American Stock Exchange Market Data Communications
American Stock Exchange Realty Assoc., Inc.
American Transtech (AT&T)
Ameritech
Ameritech Communications, Inc.
Ameritech Credit Corp.
Ameritech Development Corp.
Ameritech Mobile Communications, Inc.
Ameritech Publishing, Inc.
Ameritech Services
AMEX Commodities Corp.
AMH Associates
Amidon/Litman Associates
Martha Amram

A3

AMVOX, INC.
Anderson, Benjamin, Read & Haney, Inc.
Applied Communications, Inc. (US West)
Applied Data Research (Ameritech)
Applied Information Services
Applied Information Services Inc.
Applied Optical Media Corporation
Applied Technology Investors, Inc.
Arthur Andersen & Co.
ASEC International, Inc.
Aspen Systems Corporation (Wolters Samson)
Associated Enterprises, Inc.
The Associated Press New Media Marketing Group
AT&T
AT&T Conversant Systems (AT&T)
Audio Information Sciences, Inc.
Audiotex Directory & Buyer's Guide
AutEx Systems Inc. (ITOL)
Automated Directory Services, Inc./ADS 1001

Dr. Claire Badaracco
Barron's Natl. Bus. & Fin. (Dow Jones)
Baruch Defense Marketing, Inc.
BASELINE II Inc (Baseline)
H.M. Bazoian Co.
Toni Carbo Bearman
Bear, Stearns International Corporation
Bechtel Information Services
Beckerman Associates
Bedford Advisors, Inc.
Bell Atlantic
Bell Communications Research
Bell of Pennsylvania (Bell Atlantic)
BellSouth Advanced Networks (BellSouth)
BellSouth Advertising & Publishing
BellSouth Corporation
BellSouth Enterprises
BellSouth Information Systems
BellSouth International

A4

BellSouth National Publishing
BellSouth Services
BellSouth Systems Technology
Bernan Associates
The Bernoulli Collection
L.M. Berry & Co. (BellSouth)
Berul Associates, Ltd.
THE BERWICK GROUP
Bidnet Inc. (D&B)
BIOSIS
Peter C. Bishop
BIX-BYTE Info Exchange (McGraw-Hill)
Black's Guide, Inc. (McGraw-Hill)
Blair Audiotex Productions
BNA Communications Inc.
BNA Electronic Media Division (BNA)
BNA International Inc.
Boice Dunham Group
THOMAS BOOKWALTER
Boston Technology, Inc.
R.R. Bowker Company (Reed Telepublishing)
Bowne & Co., Inc.
Bridge Data Company
Brite Voice Systems, Inc.
Broadview Associates
BRS Information Technologies (TBG, Inc.)
Buraff Publications, Inc. (BNA)
The Bureau of National Affairs, Inc.
Christopher Burns, Inc.
Business Week (McGraw-Hill)

CACI/Federal
California Information Company
Callaghan & Company (ITOL)
Cambridge Information Group
Carinet
The Carswell Company Limited (ITOL)
C.A.S. COMSEARCH
CBOE Trading Operations

A5

CBR Information Group, Inc. (Praxis)
CCMI (McGraw-Hill)
CDA Investment Technologies
CellNet Canada
Chase Global Electronic Banking
CHERCHER
Chicago Board of Trade Information Systems and Telecommunications Group
CineBooks, Inc. (McPherson's)
Citibank Global Report
Citibank Online Delivery Systems
Citicorp Information Center
Claritas Corporation
Clark Boardman Company Ltd. (ITOL)
COADE (McGraw-Hill)
Cognivation, Inc.
Thom Collins Consulting
Combs-Moorhead Associates, Inc. (InfoProbe Inc.)
Commerce Clearing House, Inc.
Commodity Communications Corp.
Commodity Perspective (Knight-Ridder)
COMPEX Corporation
ComPlan, Incorporated
Comp-U-Card Online (Comp-U-Card Int'l)
Compumark, Inc. (A.C. Nielsen)
COMPUTER BUSINESS
Computer Intelligence
Computer Science Capital Corporation
The Conference Board Data Base
Congressional Information Service, Inc. (Elsevier)
CONNTEX (SNET)
CONSISDATA Ltda.
ConverSys, Inc.
Cooper Heller Research
Coopers & Lybrand
Coordinated Management Systems
Copyright Clearance Center, Inc.
Cordatum, Inc.
Corporate Management & Marketing Consultants, Inc.

A6

Corporate Technology Information Services, Inc. (CorpTech)
COURTHOUSE TM Records, Inc.
COVIDEA (AT&T/Chemical Bank)
Richard J. Cowles Consulting
CoWorks
C & P Telephone Co. (Bell Atlantic)
CPAid, Inc. (ITOL)
The Credit Bureau, Inc. (Equifax)
Credit Bureau Marketing, Inc. (Equifax)
Cresap—a Towers Perrin company
CTL Communications Inc.

D&B Computing Services, Inc.
DAFSA
Damar Corporation (Praxis Group)
Dana Advertising
Data America Corporation
Data Courier (Bell & Howell)
Data Resources, Inc. (McGraw-Hill)
Data Retrieval Corporation
Data Quality
Database America
Database Development
Database Publishing Company
Database Services, Inc.
Dataline, Inc.
DATALINE DADOS INTERNATIONAIS LTDA.
Datalogics Inc.
Datapro Research Corporation (McGraw-Hill)
Dataquest Incorporated (D&B)
DATAQUICK INFORMATION SYSTEMS
Data Stream (D&B)
DataTimes Corporation (Oklahoma Publishing)
DATEXT, INC. (Lotus)
Datis Corporation
Dealers' Digest, Inc. (United Newspapers)
Richard De Boo Publishers (ITOL)
Delmar Publishers Inc. (ITOL)
Derwent Inc. (International Thomson)

A7

Desktop Data, Inc.
Deucalion Venture Partners
DIALOG Information Services, Inc. (Lockheed)
Dialogic Corporation
Digital Information Group
Digital Sound Corporation
DirectoriesAmerica
Disclosure Incorporated
Document Center
DOCUMENT SYSTEMS, INCORPORATED
Donnelley Directory (D&B)
Donnelley Information Publishing (D&B)
Donnelley Marketing Information Services (D&B)
Rueben H. Donnelley (D&B)
Dow Jones & Company Inc.
Dow Jones Audiotex Services
Dow Jones Broadcast Information Services
Dow Jones Information Services Group
Dow Jones Interactive Information Services
DMS, Inc.
D-S Marketing, Inc. (DataStar)
Dun & Bradstreet Business Education Services
Dun & Bradstreet Business Information
Dun & Bradstreet Business Marketing
Dun & Bradstreet Canada Ltd.
Dun & Bradstreet Computing Services
The Dun & Bradstreet Corporation
Dun & Bradstreet Credit Services
Dun & Bradstreet Financial Services Industry
Dun & Bradstreet Information Resources
Dun & Bradstreet Information Systems
Dun & Bradstreet International
Dun & Bradstreet Planning Services
Dun & Bradstreet Program Management Services
Dun & Bradstreet Receivable Management Services
Dun & Bradstreet Reports Magazine
Pat Dunbar & Associates
Dun's Business Month
Dun's Marketing Services

DunsGate (D&B)
DunsNet (D&B)
DunsPlus (D&B)
Duston Associates—Information Strategists

Joseph L. Ebersole Associates
Electronic Information Systems
Electronic Publishing Svcs., Inc.
Elrick & Lavidge, Inc. (Equifax)
Enercom, Inc. (Equifax)
Equifax Canada
Equifax Center for Information Research
Equifax Inc.
Equifax Insurance Systems, Inc.
Equifax Marketing Services
Equifax Research
Equifax Services Inc.
ERISCO (D&B)
Executive Telecom System, Inc. (BNA)
Expert Technologies, Inc.
Export Network, Inc.
Exporters Encyclopedia (D&B)
EXTRANET
Exxon Research and Engineering Company

Fairfax Advertising
FAXplus
FEICO (McGraw-Hill)
Anne Conway Fernald Consulting
FiberLan, Inc. (Bell South)
FIND/SVP
FINIS: Financial Industry Information Service
(Bank Marketing Association)
FINNIGAN U S A
FIRSTMARK
First Bank of Minneapolis Communications Industries Division
First Call (ITOL)
Five Star Services Company, Inc.
Focus Enterprise Group
Focus Research Systems (D&B)

A9

The Freedonia Group
FROST & SULLIVAN, INC.
Frumkin Associates
FSP & Associates
FUINCA
Fulcrum Technologies Inc.
Future Computing Incorporated (McGraw-Hill)
Future Think, Inc.

Gale Research Company (ITOL)
Gardner, Carton & Douglas
Garvin Information Services (MAINAI)
General Information Systems
Geocapital
Geographic Data Technology, Inc.
Global Finance Information, Inc.
Global Villages
Goldman, Sachs & Co.
Alfred M. Goodloe Associates, Inc.
Edward J. Gottsman
GRALIN Associates
Richard J. Greene + Associates, Chartered
Grolier Electronic Publishing, Inc.
GTE
GTE Florida Teleguide
GTE Spacenet

HTL Ventures
Halcyon Associates
Hambrecht & Quist Group
Handy Associates Information Division
The Haran Management Group, Inc.
Harper & Harper Limited
The Health Professions Publ. (Lippincott)
Ronald L. Henderson Associates
Dan F. Henke
Peter Hernon, Ph.D.
Hershey & Hershey
HORIZONS Associates
Horizon Management Systems, Inc.

A10

Forest Horton
Howard-Sloan Communications Search, Inc.
Human Resource Management Services (HRMS)
Huntley, MacAllister & Associates

IBM/Academic Information System
IBM Corporation
IBM Information Network
IBM Information Services Software
IBM Information Systems Group
IBM/SRA, Inc.
IBM World Trade Americas
ICC Information Group Ltd.
ICS Office Technologies
IDA Ireland
IGW Information Group West Corporation
Illinois Bell (Ameritech)
IMS Agency Information
IMS International Inc.
Inbound Programs, Inc.
INDESYS, INC.
The Index Group
Indiana Bell (Ameritech)
iNet 2000 (Telecom Canada)
Inet Company of America
InFiNet (ITOL)
Info Globe (International Thomson)
Infomart (Southam Inc.)
InfoMedia Corp. (formerly Datatron)
Information America, Inc.
Information Consulting
Information Interface Investments
Information Market Indicators Inc.
INFORMATION ON DEMAND, INC. (Pergamon)
Information Policy Consulting
Information Publishing Corporation
INFORMATION SOURCES, INC.
Information Systems Marketing Company (ISM)
Information Workstation Group

A11

INFORUM Associates
InfoStar, Inc.
InfoTech
IN. GATE Technology
INMAGIC Inc.
INNOVATION 128
INPUT
Installed Technology International
INSTINET CORPORATION (REUTERS)
Institutt for Journalistikk (Norwegian News Association)
INTELLENET, INC.
Intellibanc Corporation
Interactive Market Systems
Interactive Response Media
International Data Solutions Corp.
International Development Center
International Thomson Business Press, Inc. (ITOL)
International Thomson Communications Inc. (ITOL)
International Thomson Holdings Inc. (ITOL)
International Thomson Information Inc. (ITOL)
International Thomson Legal and Professional (ITOL)
International Thomson Organization (ITOL)
International Thomson Professional Publishing (ITOL)
International Thomson Publishing Co. (ITOL)
International Thomson Retail Press (ITOL)
International Thomson Technology (ITOL)
International Thomson Transport Press Inc. (ITOL)
International Transcription Services
Intertel Communications, Inc.
Investment Directions, Inc.
INVISION/Robbins Associates
IRIS Corporation

J F Enterprises
Jamaica National Investment Promotion
Jane's Information Group (ITOL)
Jane's Publishing Company Ltd. (ITOL)
Jaywyn Telecommunications, Ltd.
JJS Systems, Inc.

A12

JOBNET, Inc.
The Journal of Commerce (Knight-Ridder)
The Jupiter Group (McGraw-Hill)

Kapor Enterprises
The KBL Group, Inc.
Marlyn Kemper
E.F. Keon Co.
Knight-Ridder Business Information Services
Knight-Ridder Commodity News Services, Inc.
Knight-Ridder Commodity Perspective Research Bureau
Knight-Ridder Financial Information
Knight-Ridder Financial News
Knight-Ridder Money Center
Knight-Ridder Tradecenter
Knowledge Access International, Inc.
Knowledge Resources, Inc.
KYODO NEWS INTERNATIONAL, INC.
KRS Remote Sensing

Land Decision Technologies
Landmark Publications (US WEST)
Laser Resources, Inc.
Lawler Associates
Leading National Advertisers
Learned Information, Inc.
Legi-Slate (Washington Post)
LIMA LINK srl
LINK Resources Corp. (IDC)
J. B. Lippincott Company
Arthur D. Little Information Services Practice
LOMALEX Audio Directories, Inc.
Rita Lombardo Telemarketing
Lotus Development Corporation Information Services Division
LYNX Communications Corporation

MA Management
Mainstream Data
Main Street Marketing U.S.A., Inc. (Praxis)
Malhotra & Associates, Inc.

A13

John C. Maloney & Associates, Inc.
Management Information Technology Inc.
Donald Marchand
Market Data Retrieval (D&B)
Marketel International, Inc.
The Marx Group
The MAXIMA Corporation
Mayer, Brown & Platt
McCain, Russell & Associates
Dr. Charles R. McClure
McCormack & Dodge (D&B)
McGraw-Hill Book Company
McGraw-Hill Broadcasting Co., Inc.
McGraw-Hill, Inc.
McGraw-Hill Information Management
McGraw-Hill Information Systems Company
McGraw-Hill International Book Company
McGraw-Hill Publications Company
McGraw-Hill Ryerson (Canada Group)
McGraw-Hill Training Systems
McKinsey & Company, Inc.
McNulty Development, Inc.
McPherson's America Inc. (McPhersons's Ltd.)
Mead Data Central
MEDIA 4
Medialink International Corporation
Medical Economics Company, Inc. (ITOL)
MEDSTAT Systems, Inc.
Memory-Tech Inc. (Mitsubishi)
Meredith Diversified Company
METROPOLITAN COMMUNICATIONS
Michigan Bell (Ameritech)
MicroInfo
Micromedex, Inc. (Mead)
Micromedia Limited
Microspace Communications Corporation
Midlun
Minitel USA
MISSION: A Consulting Group

A14

Mitchell International
MLR Publishing Company
MMS International
MMS International Hong Kong (MMS)
MMS International U.K. (MMS)
Monchik-Weber (McGraw-Hill)
Moody's Investors Service (D&B)
Moore Data Database Publishing Group
Mortgage Commentary Publications (ITOL)
Morgan Rand Publications, Inc.
MORTEK Corporation
David Moses Consulting
Mountain Bell (U S WEST)
MSRS, Inc.
MultiComm Telecommunications Corp. (Amway)
MultiLink Incorporated

NASD Market Services, Inc.
National Information Technology Council, Inc.
National Phone Services, Inc.
National Planning Data Corporation
National Satellite Paging, Inc.
(Mobile Communications/Radiofone/NPR)
Natural MicroSystems Corporation
Nelson Canada (ITOL)
Neodata Services (D&B)
NERAC, Inc.
Neufeld Associates
Nevada Bell (Pacific Telesis)
New England Telephone (NYNEX)
New York Futures Exchange, Inc. (New York Stock Exchange)
New York Stock Exchange Market Data Division
New York Telephone Co. (NYNEX)
NewsBank (Readex)
Newsday Electronic Information Services (Times Mirror)
NewsNet Inc. (Independent Publications)
Newspaper Advertising Bureau Marketing
& New Technology Department
Newsweek (Washington Post Co.)

A15

A.C. Nielsen Co. (D&B)
Nielsen Clearing House (D&B)
Nielsen Home Video (D&B)
Nielsen Marketing Research (D&B)
Nielsen Media Research (D&B)
Nikkei (McGraw-Hill)
N N Telemanagement
Kendrick Noble
North Star Communications Group, Inc.
Northern Telecom Meridian Mail
Northwestern Bell (U S WEST)
NTS Data Service, Inc.
Numerax, Inc. (McGraw-Hill)
NYNEX Corporation
NYNEX Business Info. Systems (NYNEX)
NYNEX Development Co. (NYNEX)
NYNEX Info. Resources (NYNEX)
NYNEX Service Co. (NYNEX)

Occupational Health Services, Inc.
Octel Communications Corporation
Official Airline Guides, Inc. (D&B)
Offshore Information Services Inc.
Ohio Bell (Ameritech)
Omnigraphics, Inc.
Omniphone, Inc.
ON Technology, Inc.
Online Computer Systems, Inc. (Reed Telepublishing)
H. B. Oppenheimer Inc.
OptImage Interactive Services Company
(Philips/R.R. Donnelley)
Option Line
Paul Orme & Associates, Inc.
Oro Communications Technology, Inc.
The Oryx Press
Osborne (McGraw-Hill)
Dr. Benjamin Ostrofsky
Ottaway Newspaper (Dow Jones)
Overseas Keyboarding Services

A16

Pacific Bell (Pacific Telesis)
Pacific Bell Directory (Pacific Telesis)
Pacific Northwest Bell (U S WEST)
Pacific Teleconnect, Inc.
Pacific Telesis Corp.
Pacific Telesis Group
Pacific Telesis International
PacTel Corporation (Pacific Telesis)
PacTel Finance (Pacific Telesis)
PacTel Infosystems (Pacific Telesis)
PacTel Properties (Pacific Telesis)
Paget Properties, Inc.
PaineWebber Group Inc.
Panel Publishers, Inc. (Wolters Samson)
Paradigm Solutions Corp. Division
Passport Telematique
Peat Marwick Main & Co.
Perception Technology
Pergamon ORBIT Infoline, Inc.
PERQ Corporation
Petroleum Information (D&B)
Pharmaco-Medical Documentation, Inc.
Philips and DuPont Optical Business Company
Philips New Media Systems
Phone Programs, Inc.
PICK-A-WINNER
Pike & Fischer, Inc. (BNA)
The Pofcher Company
R.L. Polk Motor Statistical Div.
Practitioners Publishing Co., Inc. (ITOL)
Post-Newsweek Stations (Washington Post)
Praxis Group, Inc.
Prentice-Hall Information Services (Gulf & Western)
PRN Associates
Probase Information Networks
Prodigy Services Company (IBM/Sears)
Productions-By-Phone, Inc.
PsycINFO (American Psychological Assoc.)

A17

QUANTUM Computer Services, Inc.
Quotron Systems, Inc. (Citibank)

Rand McNally—TDM, Inc.
READEX Microprint Corporation (NewsBank)
Real Decisions Corporation
Real Estate Data, Inc. (Praxis)
Real Learning Corporation
Reference Technology Inc.
The Research Link, Inc.
Research Publications (ITOL)
REUTERS
REYCO
Riley & Johnson
Joseph M. Ripley
Ed Ritvo Consulting
Rolm Corp. (IBM)
Routledge, Chapman & Hall, Ltd. (ITOL)
Bob Rubinyi

Sanborn Map Company (Praxis)
Savage Information Services (formerly SPUR)
Savage Information Services
Scientific Consulting
Schwab Investor Information Service
SEAT (Division of Stet S.P.A.)
SEC Online
SEM Systems
SENCOR
SGML Publishing Systems Ltd. (Datalogics)
I.P. SHARP ASSOCIATES LIMITED (REUTERS)
Shepards (McGraw-Hill)
Sheshunoff Information Service, Inc. (IOTL)
R. Shriver Associates
SilibiS Corporation
Charles E. Simon and Company
SIRCo International (Selected Information Retrieval Company)
SiteSelex, Inc.
Slater Hall Information Products

A18

SNET Communication Services
SNET Directory Operations
sociological abstracts, inc.
Software Ventures International Corp.
Solution Associates
The Sombers Group, Inc.
SONECOR Network Services, SNET
SONECOR Systems, Division of SNET
Source Telecomputing Corporation
SOURCENET Corporation
South Central Bell (BellSouth)
Southern Bell (BellSouth)
Southern New England Telephone ("SNET")
South-Western Publishing Co. (ITOL)
Southwestern Bell Corporation
Southwestern Bell Mobile Systems, Inc.
Southwestern Bell Publications, Inc.
Southwestern Bell Telecommunications, Inc.
Southwestern Bell Telephone Company
Spada Organization Limited
Professor Arnold Spinner
Standard & Poor's Compustat Services (McGraw-Hill)
Standard & Poor's Corporate Information Company (McGraw-Hill)
Star King Communications
States News Service
Dr. Ray L. Steele
Stigelman Associates, Inc.
Stina Corporation
Straat Group Incorporated
Strategic Information Management
Strategic Intelligence Systems, Inc.
Strategic Marketing Systems, Inc.
Supreme Data Company Ltd.
John Sviokla
Systemetrice (McGraw-Hill)

Taconic Development, Inc.
Tax Management, Inc. (BNA)

A19

Betty W. Taylor
Technical Data International (ITOL)
Technical Economic Services (D&B)
TECHWORLD
Telebase Systems, Inc.
Telecompute/CM
Telekurs AG Financial Information Division
Teleline, Inc.
Telenet Communications Networks
Telephone Announcement Systems, Inc.
Telephone Information Services
Telescope
Telstar Voice Systems
Teltech Resource Network
Tescor, Inc.
Thomas Online
Thomson Directories (ITOL)
Thomson Information Services Ltd. (ITOL)
Thomson & Thomson (ITOL)
Thomson Travel (ITOL)
Time Inc.—Magazine Group
Time-Sensitive Delivery Guide, Inc. (Pitney Bowes)
Touche Ross & Co.
Trade Data Reports Inc.
tradeNET, Inc.
Trading Systems Technology (Waters Info.)
Traffic Resources Corporation
Transactions Marketing, Inc.
TransData Corporation (ITOL)
Travaco DBIS, Inc.
Travelmation Corporation
TRI-CO (U S WEST)
Trinet, Inc.
TRW
TRW Customer Service Division
TRW Information Systems Group
TRW Overseas, Inc.
TylData B.V.

UNICOM
UNISON Telecommunications Service
Unisys Network Applications Group
United Communications Computer Svc. Group
United Home Equity Services Inc. (Praxis)
University Microfilms International (UMI) (Bell & Howell)
UPDATA Publications, Inc.
URIX Corporation (Audio Info Sci.)
USACO
US Payphone Inc. (Info. Publ. Corp.)
U.S. Videotel
U S WEST Advanced Technologies
U S WEST Corporate Communications
U S WEST Direct
U S WEST, Inc.
U S WEST Information Systems
U S WEST Knowledge Engineering, Inc.
U S WEST Strategic Planning
Utlas, Inc. (ITOL)
Utlas International US Inc. (ITOL)

Value Line Data Services, Inc. (Value Line, Inc.)
Johan Van Halm & Associates
Van Nostrand Reinhold Company (ITOL)
Vanguard Telecommunications, Inc.
Venture Economics, Inc.
Veronis, Suhler & Associates Inc.
Videodial, Inc. (Telesystemes)
Vidiotex Communication
VNU Business Information Services, Inc.
VoiceCom Systems
Voice-Gram, Inc.
Voice Response, Inc. (Call-It Co.)
VoiceMail, Inc.
Voicemail International, Inc.
Voicetek Corp.
Raymond F. Vondran
VORTECH DATA, INC.
VU/TEXT Information Services (Knight-Ridder)

A21

Wadsworth Electronic Publishing (ITOL)
Wadsworth Inc. (ITOL)
Wall Street Computer Review
WANG Financial Information Services Corp.
The Warbler Group
Warren, Gorham & Lamont Inc. (ITOL)
The Washington Post
The Washington Post Company
Washington Service Bureau
Washington Post/LA Times
Waters Information Service, Inc.
Watzman + Keyes Information Design
Benjamin Weil
H. Skip Weitzen
Weitzman & Sachs
Welsh, Carson, Anderson & Stowe
West Professional Services
Westbridge Information Services
WESTLAW (West Publishing)
Whelan Associates, Inc.
John Wiley & Sons, Inc.
H. Donald Wilson Inc.
Windsor Systems Development, Inc.
Windsor Technologies, Ltd.
Wisconsin Bell (Ameritech)
Dr. Robert A. Wood
WorldSource Ltd.
Wright Database Services

Zapodel Inc.

Attachment F

SPECIAL EDITION

GRAPHIC ARTISTS GUILD

FALL 1987 — A NATIONAL VOICE FOR GRAPHIC ARTISTS — LEGISLATIVE ISSUE

ASSIGNMENT: (BLACK & WHITE) FOR-
ARTICLE ON THE AMERICAN FAMILY FARM CRISIS ...

WHAT'S WRONG WITH THIS PICTURE?

ARTIST: Let me see if I understand this correctly. You want to hire me to illustrate your (book, magazine, annual report, etc.) so that your message will get across to your audience, to enhance the image of your product/company and increase the value of your product. You will give me a general idea of the message you'd like explained visually. You are hiring me because my style and skills fit your image and needs. Am I right so far?

CLIENT: Yup.

ARTIST: I go back to my studio, research the product, your image and your needs, develop visuals to get the job done with materials that I buy, with skills I've honed, and bring these images back to you for approval. Am I still on track?

CLIENT: Yup.

ARTIST: At this point, you become the author of my work. You can use it for the original job we agreed on, reuse it for posters, towels, sheets, toys, wallpaper, brochures, advertising and anything else you can think of, or you can sit on it or throw it out. You can also have another artist (or non-artist) draw on it, change it, re-color it, or cut it up and use it again. You get all this for a one-time use fee and I can't ever use my work again. In fact, I can't even put my name on it without your permission. Is that pretty much what this contract is about?

CLIENT: Yup.

ARTIST: Can we talk about this?

CLIENT: Nope.

Sound a little fantastic? We thought so too...10 years ago. But increasingly conversations much like this are taking place for freelance artists, photographers and writers all over the country, in every market area that commissions outside professionals to produce the visuals and literary work that help market society's products, culture and messages.

The "contract" is work-for-hire, a provision of the Copyright Law that is endangering the survival of artists, photographers and writers, whose labor produces much of the profit in our increasingly information- and service-oriented economy.

Since 1978 when the Copyright Law [illegible] the work-for-hire provision took effect, [illegible] have been [illegible] the [illegible] of the [illegible] and [illegible] their [illegible]

PURCHASE ORDER (OR LIES MY CLIENT TOLD ME!)

BY STEVE BRODNER

Artists have come to know a powerful weapon that publishers use at appropriate moments to counter arguments for artists' rights. This weapon is worn-for-hire and it is purely and simply a lie. It is the lie of authorship.

Publishers claim that an assigned commission is necessarily *their* intellectual property, not that of the artist. Such claims, they say, are strongly backed up by the *process* in which an editor can give an artist an extremely detailed job description, an heavily art-directed that the finished piece must be, unquestionably, the property of the client, entitling him her to all uses, reuses and possession of original art.

To non-artists, this lie has a certain appeal to "common sense." It has a simple premise and makes an easily understood connection between art's paternity and rightful custody. But to an experienced artist, it is indeed a bald-faced whopper. Of course no client can claim to have "created" any artist's work. But how to communicate clearly both the wrong-headed conclusions as well as its mad premise?

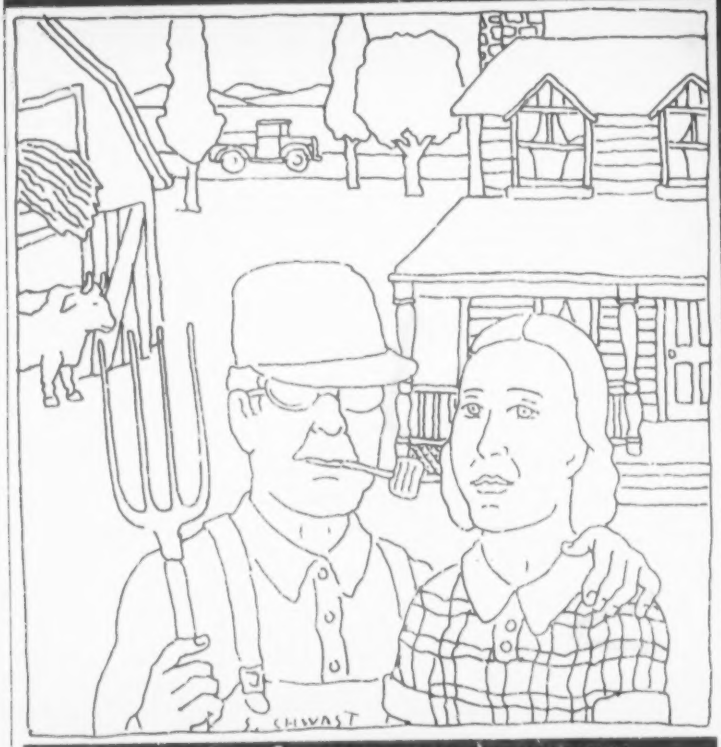
This brings us to the question of language. It has been my experience that an artist is, aside from whatever else, a master of a distinct and, to some, foreign lingo—the visual language. There are structures and forms that artists' trade in which are arcane to and clumsily grasped by others. The act of creating a work of fine art, for example, involves taking internal and/or external stimuli and responding to them through purely visual means. Though these ways of thinking are hugely influenced by an artist's personality and character they are finally shaped by the ability to respond to personal needs using visual language.

Commercial artists have a linguistically more difficult job. They continually straddle different worlds where foreign rules of communication prevail. They must come to an initial understanding of their clients needs, translate these visual ideas into verbal terms for the client and back again to begin the piece. Upon completion of the work they must quite often repeat the process in the event of revisions. Although artists may become rather good at translating on this level, they are never presented with the hopeless task of comprehensively describing the complexity of the creative process detailing and codifying the unaccountable and immeasurable instinctive decisions and learned technique that go into any project.

ILLUSTRATION © 1986 BY FRANK STELLA

THE GRAPHIC ARTISTS GUILD

SPECIAL EDITION



DESCRIPTION: TWO FARMERS, HUSBAND AND WIFE, STANDING IN THE DIRECTION OF THE READER ...

letters to Congress, testimonials to the Copyright Office, personal appearances, panels and workshops, long and short.

Many people have worked on this campaign, their time all given to the cause economically and professionally by the industries. The artists who contributed their visuals and the writers who provided the copy, did so out of a commitment and passion to see work-for-hire reformed so that they and their work can survive. Their commitment also extends to the rich cultural heritage that we Americans have come to expect and believe is our right.

The artists, photographers and writers whose testimony and work appear in these pages are speaking for and with over 40,000 colleagues who support the Copyright Justice Coalition. The eloquence of the visuals and written pieces included here needs no further description or explanation. ■

THE EDITORS

TALES OF A FREELANCE ARTIST

The following testimony was gathered for the Copyright Justice Coalition by the Artists & Writers Work-for-Hire Project.

Members of the National Writers Union and the Graphic Artists Guild worked together to gather and put in to writing stories of work-for-hire from the artists' point of view. The intent of this project is to help close the "reality gap" that Senators and Representatives have in understanding how these highly skilled professionals work and how the current law affects them. The words and pictures speak for themselves.

Originally from Oklahoma, I now live and work in New York. I am a member of the Graphic Artists Guild, the Society of Illustrators, the American Institute of Graphic Arts, and the Alliance Graphique Internationale, and have been working as a professional, self-employed illustrator and graphic designer for the past 23 years. My work includes posters, advertising, magazine covers, book jackets, record albums, packaging, and so forth, and has been the subject of newspaper and magazine articles and books. It has also been exhibited in galleries and museums in this country, Europe and Japan, and in many permanent collections, including the Museum of Modern Art and the National Portrait Gallery.

Work-for-hire is not just a problem for younger, less-established artists who don't have the leverage to negotiate. As publishers have gotten more corporate and more ruthless, it is a worrying

Continued from previous page

That is where the work-for-hire advocates catch us artists with their lie, with an absurd challenge to translate ourselves blue in the face, to somehow explain an inexplicable (almost magical) experience, to show its individuality and personal nature, proving verbally that authorship must rest with the creator. It occurred to us, at the Graphic Artists Guild, that perhaps the best way to discuss this point is not in written language at all. We would devise a way to reveal, using our visual language, in the clearest, most direct manner, the truth about the preparation of a work of art and how that affects the entire work-for-hire debate. Soon a project was agreed upon.

The same very specific job description for an illustration assignment would be given to a cross-section of working artists. They would not be told which pre-existing work of art it was a job description for (we chose "American Gothic" by Grant Wood).

The object would be to see how very mundane subject matter, with precise art direction, would be handled by these professional artists.

Two weeks later we had our astounding results: the paintings and drawings that we received (which are reproduced throughout this issue) went beyond our point. From a stormy epic oil painting by Susan Stillman, to a simple song of isolation by Guy Billout, the work all followed the spirit and the letter of the description and clearly shows the primacy and singular impact of an artist's contribution to an art project.

These results prove far better than any carefully worded tract on the process of art just why artists are always creators. Along with their professional and technical skills, in whatever they do, they impart a personal, indelible gift to the piece. It comes straight from a very special place wherein springs their uniqueness and originality.

Publishers cannot continue to accept this gift nor can they be permitted, while coveting it, to deny its existence! For years artists have been looked upon as tools, appendages, the hats and gloves of the graphic ballgame. The time has come for them to be seen in the clearest possible light, as they truly are: talented professionals, players who need to be finally considered part of the team and to be accorded the just credit for the enormity of their contribution. ■

Steve Brodner is an illustrator and a Vice President of the National Graphic Artists Guild.

WHAT'S A W4H ANYWAY?

BY TAD CRAWFORD

Work-for-hire is the provision of the new law that most threatens the artist. The employer or other commissioning party owns the copyright in a "work for hire" as if they in fact created the work. This means that the artist won't even have the right to terminate their ownership of copyright after thirty-five years. Also, if an artist were to copy all or part of a work done as work-for-hire, the artist would be infringing his or her own work. If enough work-for-hire is done, the artist may discover that he or she has created an alter ego (in the form of a large supply of the artist's work that can be reused and modified) who may very well compete with the artist and damage the artist's livelihood.

A work-for-hire can be come into being in two ways: (1) an employee creating copyrightable work in the course of his or her employment, or (2) certain specially commissioned or ordered work, if both parties sign a contract agreeing it is work for hire.

If such an agreement is made, the following specially ordered or commissioned works will be work-for-hire:

1. a contribution of collective work, such as a magazine, newspaper, encyclopedia or anthology;
2. a contribution used as part of a motion picture or other audiovisual work;
3. a translation;
4. a compilation, which is a work formed by collecting and assembling pre-existing materials or data;
5. an instructional text;
6. a test or answer material for a test;
7. an atlas;
8. and a supplementary work, defined as a work used to supplement a work by another author for such purposes as illustrating, explaining or assisting generally in the use of the author's work.

Examples of supplementary works are forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, appendixes and indexes.

The crucial point is that the artist must agree in writing that a work is a work-for-hire. If the artist doesn't agree in writing that a work is a work for hire, then it can't be (unless the artist is treated as an employee). Since it isn't clear whether other language can be used in place of the phrase "work for-hire," artists should also refuse to sign anything with language in it that sounds similar to "work-for-hire" or an employment-type relationship. Also, if an artist does a specially ordered or

FALL 1987 3

SPECIAL EDITION

situation for every working artist.

For many years, the editorial market was well-ordered. Contracts were generally fair, with respect for the artist's role. Specific rights were purchased, and artists retained authorship of images, and could receive benefits when they were re-used.

But now, simply because they can by law get away with it, more and more publishers are automatically demanding and getting far more rights than they need or have any intention of using, without paying more for them.

The problem is the law. It needs to be changed to call a halt to these practices.

I want to distinguish between the nature of authorship and meeting the needs of the client, and our special problem with work-for-hire. First, we bring to bear in the interest of the client our unique skills and visions, one artist very differently from the next. Second, we are not doing so as employees.

Supporters of work-for-hire do so that a creative act takes place between an idea and its expression. They can tell themselves that the idea is theirs, and the artist is only a pair of hands to execute it. But think of the difference in execution among, say, Charles Schultz, Norman Rockwell, Andy Warhol, Andrew Wyeth. Clearly each rendition of the same idea will be unique. The idea is not copyrightable. The artist's completed expression is copyrightable, however, and rightfully belongs to him.

I am always willing to sell whatever rights are needed, for proper compensation. But I do resent being expected to give away everything just to get the job, or get paid.

Artists are individual contractors. We support ourselves and our families by our work. We pay for our own pensions, insurance, vacation and sick time, utilities, worksources, and other expenses. We give our individual talents and skills to the assignments we receive, and are entitled to the long-range benefits of our creations.

Art, photography, writing and music are tangible economic resources. Intellectual property is becoming one of our country's primary products, and the people who are creating these products should be rewarded, not robbed.

I recall, created a "Man of the Year" cover for TIME, a personal vision of a person who made history. I was pleased to have the assignment, but Time Incorporated's rigid, blanket insistence on adherence to the work-for-hire clause is a bitter pill to swallow. Signing an admission that the client is the creator of my work is tantamount to swearing that the earth is flat!

On the other hand, a good example of how things ought to work is my experience with "The Mystery of Edwin Drood," the Broadway hit produced by Joseph Papp and the New York Shakespeare Festival. I have been compensated for its creation and use as a poster, in advertisements, on the cover of Playbill, on the record album, the cassette and disc packages, and the paperback book. If Mr. Papp had insisted on these rights for the price of the poster, my potential earning power would have been decimated. But he is someone who instinctively respects the rights and dignity of the artist.

We should not have to face the conflict of work-for-hire-or-don't-work-at-all, especially in situations where the disparity of bargaining power is so obvious.

My colleagues and I ask you to consider the worth of our creations and vote against work-for-hire.

By Paul Davis, Illustrator

Continued from previous page

commissioned work that is outside of the categories shown above, it cannot be a work for hire (unless the artist is treated as an employee). For example, a portrait of someone done on a commission basis should not be a work for hire because it doesn't fit any of the categories. If work is created independently and submitted in final form to a potential buyer, the work for hire problem should not arise. But, even here, caution dictates that the artist not sign anything indicating the work is the work for hire in order to avoid any confusion.

Tad Crawford is an attorney and author of The Legal Guide for the Visual Artist. He is also former general counsel to the Graphic Artists Guild.

RECENT COURT DECISIONS: AN UPDATE

BY TAD CRAWFORD AND MICHAEL HEMER

A bulletin dated 1/27/87 from the American Association of Advertising Agencies (AAAA) to its member agencies has created widespread concern in the creative community. The reason for this concern is the assertion in the bulletin that cases under the new Copyright Law support "long standing industry presumptions" that photographers give up all rights when creating images for advertisements.

The bulletin states that court decisions "appear to support the understanding of advertisers and agencies that (1) specifically commissioned work of an independent contractor should be considered 'work-for-hire' even in the absence of a written contract, and (2) the copyright in such work should rest with the party supervising the effort." Needless to say, such assertions will encourage the agencies in drafting work-for-hire and all-rights contracts to use when offering assignments to photographers.

SUPERVISION AND CONTROL

The decisions cited in the AAAA bulletin are *Aitken, Accountants Ltd. v. Spiegel, Inc.* and *Peregrine v. Lauren Corporation*. In *Aitken*, which involved a lawsuit brought by a commissioning party against an independent accountant, the plaintiff who conceived the form of certain information stood over the artists and artwork at critical stages of the process, telling them exactly what to do. He was, in a very real sense, the artistic creator. The court decided the artists had done work for hire because of this active supervision.

Peregrine involved a lawsuit brought by a photographer against the commissioning party. The court concluded: "There is no question in this case that Mr. Peregrine's work was undertaken at the insistence of the employer and that the employer had the right to supervise Mr. Peregrine's work. It is clear that at any point the employer could have ordered any of Mr. Peregrine's actions otherwise or radically changed the course of the shoot." As the same time the court found that the photographer was an independent contractor.

The AAAA bulletin states that "the best protection for advertisers and their agencies is to have the freelancer execute a contract clarifying the work is 'made for hire.'" In the absence of such a contract, however, the AAAA indicates that *Aitken* and *Peregrine* can be relied on to create implied work-for-hire contracts.

THE INTENT OF THE COPYRIGHT LAW

The 1976 Copyright Law, which took effect on January 1, 1978, specified that there could be only two types of work for hire: (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agreed in a written instrument signed by them that the work shall be considered a work made for hire."

The reasonable understanding of these work for hire provisions was that works commissioned from independent contractors could be work for hire only if they fell within clause 2. The House Report accompanying the 1976 law stated, "The definition now provided by the bill represents a compromise which specifies, spelled out those specific categories of commissioned works that can be considered 'works made for hire' under certain circumstances." If any work commissioned from an independent contractor could be work for hire under clause 1 because the commissioning party exercised control over the work, then the clause 2 work for hire requirements that the work fall within the specified categories and that there be a signed agreement would be of little value.

Assume, for example, that an independent contractor agrees to do an illustration for a magazine. This is a contribution to a collective work under clause 2. The law clearly states that no work is

SHE WEARS A SIMPLE GINGHAM DRESS; HE, A WORN PAIR OF OVERALLS, PERHAPS AN OPEN ...

ILLUSTRATION © 1987 BY SUSAN STILLMAN

SPECIAL EDITION

Continued from previous page

commissioned work to be work for hire there must be a written contract signed by both parties. Assume further that no such contract exists but the contractor is supervised by the commissioning party. Under *Aldon* and *Peregrine* this could be work for hire under clause 1. The absurd result is that clause 2 specifically says it is not work for hire while clause 1 says it is work for hire.

The preliminary draft for the Copyright Law revision defined work for hire as "a work prepared by an employee within the scope of the employee's employment, but not including a work made on special order or commission." Clearly, a freelancer on assignment would never have been considered an employee under that language. The draft was altered because of the opposition of book publishers and motion picture producers. The next draft defined work for hire as "a work prepared by an employee within the scope of his employment, or a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire." Creators' representatives objected to this version, and a compromise was achieved by listing the specific categories of commissioned works which could be work for hire. Nothing in this legislative history suggests that Congress ever intended to allow commissioned works to be work for hire without a written contract—or, in the version which became the law, a written contract relating to work in certain limited categories.

A STRICT INTERPRETATION

Other courts have dealt with issues similar to *Aldon* and *Peregrine* have correctly interpreted Congressional intent. For example, in *Childress v. Hyatt Sports Magazine* a photographer who had created a photograph of Ali MacGraw at her request was found not to have done work for hire. The court stated: "Defendants cannot possibly assert that plaintiff (the photographer) is an 'employee' of either Ms. Fennie or Ms. MacGraw." On reargument, the court again found for the photographer and concluded that even if work for hire could apply to the photographs, "because plaintiff would be an independent contractor there would have to be some writing evidencing the transfer of his copyright to his subjects." So the photographer had standing to sue for unauthorized use of his photograph.

In *Kenbrooke Fabrics, Inc. v. Material Things*, the plaintiff retained an Indian design firm to create a textile design. In the course of several transatlantic telephone conversations the plaintiff and the designer agreed [illegible] with payment to be made [illegible]. The designer then sent a letter with a standard boilerplate legend which declared that the work was to be "considered a work for hire." The court rejected the argument that this could be work for hire, reasoning:

> The House Report states unequivocally that with respect to special orders or commissioned works, the assignment of works that may be considered works for hire have been carefully and specifically circumscribed.

Finally, *Childress* and *Kenbrooke Fabrics* involved lawsuits against infringers who were brought by the photographer (the seller) or a commissioning party. It is worth observing that the *Aldon* case did not represent a dispute between a commissioning party and an artist. Rather it also arose out of the commissioning party's need to show copyright ownership in order to sue the infringer. Therefore, in order to bring the infringer to justice, the court may well have strained to find work for hire so as to enable the plaintiff to prevail. Only I'm glad was a claim by a freelance photographer against the commissioning party and the result is an anomaly of questionable value as a precedent for the future. Certainly *Childress* and *Kenbrooke Fabrics* do reflect the original intent of Congress.

FUTURE DIRECTIONS

The divergence of rationales in the cases means that conflicting decisions may continue to be seen in courts across the country. For the photographer, this uncertainty means that a written contracts reserving the rights should be obtained prior to commencing an assignment. If this is not done, expensive litigation may be necessary to redefine questions of copyright ownership. ■

Paul Crawford was legislative counsel for the Copyright Justice Coalition. Michael Remer is general counsel for ASMP/The American Society of Magazine Photographers.

CONGRESS & COPYRIGHT: NOW AND BEYOND

BY SUSAN M. DOOHA

Built through the informal affiliation of national artists' photographers' and writers' groups, the Copyright Justice Coalition's track record of legislative success at state and federal levels is now greater than that of any other group representing creators.

The Copyright Justice Coalition began its activities years ago when the Society of Illustrators, the American Society of Magazine Photographers and the Graphic Artists Guild joined forces to repre-

JACKET AND WORKSHIRT. HE CAN BE HOLDING A PITCHFORK. THE BACKGROUND SHOULD ...

ILLUSTRATION © 1988 BY DAVID SUTER

This, Friday, 13 May, 1988, Jannean Ferree has just returned to Dallas from a meeting with her art director. Over breakfast she tells me about a job. She sends a layout and script as applied by return messenger. Later, she can't again offer sketch as she would like me to do the interior illustration on the project. The fee, though a reasonable one, is only adequate for this complicated job. We agree to meet and discuss this project further on Friday.

Friday, 16 May, 1988. I meet with Jannean and the AD and agree to accept the assignment. It has become about 50% larger and the fee has been increased by $100. After reading a Graphic Artists Guild letter in the day's mail, I call Jannean back just to make sure the PO she's going to send me doesn't say "work-for-hire." I don't usually encounter this problem but, I have an uncomfortable feeling about this job. She says all her PO's are work-for-hire. I say I won't work under such an agreement, can we change it?

My sense of better judgment tells me not to agree to this unfair contract but, I'm still thinking about the large fee. Hmmm...maybe I should sign the stupid PO, take the money and donate some of it to the Guild's legislative campaign against work-for-hire.

Jannean becomes very defensive at this suggestion and begins defending the contract vigorously with some spurious claims:

"You're only helping to execute the art director's concept..."

"Being a fine artist is one thing but a commercial artist automatically agrees to work under someone else's terms..."

"This is David Ogilvy's contract and I would not think of asking him to change it..."

"We would need an impossibly large staff to keep track of reproduction rights agreements..."

"We'd like to be able to give you lots more jobs..."

"A photographer friend used to do hundreds of thousands of dollars in work until he started refusing to do work for hire..."

It might simply be company policy but, Jannean defends it personally and with a vengeance. I get the feeling that her reasons come from an agency memo rather than an awareness of the issue. I shiver to think of legions of obedient art buyers reciting this manufactured rationale to scores of confused artists.

She says she will have to call me back to let me know if I get the job. Get the job? I've already accepted it, now let's make sure that the purchase order doesn't deprive me of protection under Copyright Law. The notion that a contract should be agreeable to both parties is a novel one to Jannean.

Without giving me the chance to decline the assignment, Jannean says she's taking it away from me; she will send a messenger to pick up the layouts first thing Monday morning. I send it back with a note saying, "Thanks for considering my work. I'm sorry we couldn't come to agreeable terms."

Immediately I am relieved of a feeling of foreboding which has gripped me from the moment I received the job.

When I become a freelance artist I gave up the security of a regular paycheck, insurance, vacation, bonus, retirement and other benefits of a staff job in return for the opportunity to compete solely based upon the merits of my work and realize the greatest return from my efforts.

FALL 1987

SPECIAL EDITION

To my best understanding, when you sign a work-for-hire contract you are agreeing to be a pair of hands under someone else's creative direction and that the illustration you create will not in any way become someone else's property but be considered as created by them with you as technical assistant. Furthermore the fee that you are receiving covers all reproduction rights forever and ever, so you will not see another penny, no matter how many times or ways the art is reproduced.

If you weren't sure what "work-for-hire" meant, well now you know.

By Daniel Adams, Designer/Illustrator

An important aspect of the graphic arts industry is comic books. About 200 people are now employed as freelancers for either Marvel or DC comics under work-made-for-hire. Marvel and DC were among the first to make use of the work-made-for-hire provision in the Copyright Law and to make new contracts with all of their freelancers. The Academy of Comic Book Artists and other organizations had previously worked to get original art returned, to get overseas sales rights, and reprint rights, but when the work-made-for-hire provisions were written into the law, work-made-for-hire contracts were offered to all comic book freelancers across the board. If you didn't sign it, you could not work.

Because of the agreement, three people refused to work for Marvel or DC—Sergio Aragonés, Jack Kirby and myself. We had to find work elsewhere, and for the time, Marvel and DC basically controlled the industry. Since that time, small publishers have arisen, who now account for about 20 percent of the market and operate without work-for-hire. Marvel, the bigger of the two, instituted the return of original art as a "favor." Their policy is to send out a work-made-for-hire contract saying if you want back your original artwork, you have to sign the agreement. In other words, the agreement is retroactive, for work that you may have done in the 1950's or '60's.

Another strange situation that permeates the comic book industry is that the New York State tax people don't seem to agree with the work-made-for-hire provision. They say if you do freelance art and sell it, you have to charge sales tax. Either you have to get your artwork returned or you have to pay sales tax. Work-made-for-hire says the art belongs to the publisher, so where do you stand with the state tax people?

There is absolutely no reason for this provision in the law. In essence, it is two or three sentences that should be surgically excised, as they were artificially implanted in a book-long law. During the congressional hearing that led to the inclusion of this provision in the law, the problem was small publishers, who desired it was obtuse to write contracts for writers who might write one paragraph in an encyclopedia. The concern of the encyclopedia publisher has spread to everywhere in the industry. Other people have taken advantage of it—no desk, no social security, no rights to your work—for the sake of a paragraph in an encyclopedia. We as graphic artists did not stop to protest the intent of it, now it's a disease that is everywhere and is rapidly spreading to a condition that can be used on us.

© 1987 Guy Billout

INCLUDE A SIMPLE WHITE CLAPBOARD HOUSE, TREES, SUGGESTIONS OF OTHER BUILDINGS ...,

Continued from previous page

sent the concerns of professional artists and photographers regarding copyright and other public policy issues. The Coalition's purpose has remained constant—to give artists, photographers and writers a voice in state capitols and in Washington.

The Copyright Justice Coalition now represents concerns raised by over 6 organizations of artists, photographers and writers, and has been able to reach other professionals around the country to elicit their cooperation and support.

We have an historic opportunity to create yet another stunning success—changing the Copyright Law. But that success is not assured without the consistent work of a unified coalition. We must continue to focus on grassroots lobbying, fundraising gathering and image building with legislators.

All artists, writers and photographers have an investment to protect. In the ten years since the first revision of the Copyright Law, creators and lawmakers created tremendous advances in artist's rights legislation. Authorship rights and fair practices acts have been passed all over the country. A track record was established and a message was sent to Washington that creators are in the public policy arena and can win. We are simply asking lawmakers to continue pressing for equity for creators by closing the work-for-hire loophole.

WHERE WE ARE NOW

The Copyright Justice Coalition has created what the National Law Journal called "a wave of artists' rights legislation" in the U.S. We've been covered by trade magazines and national newspapers, but we will have to continue to win each stage of the legislative process in order to meet our goal of changing the law.

We are pressing for hearings on our bills that have been introduced in Congress. We are mobilizing grassroots activity nationwide and gathering testimony from creative professionals who are affected by work-for-hire.

Congressman Thad Cochran (R-Miss.) introduced our work-for-hire reform bill into the Senate. He told his colleagues:

"There is considerable support throughout the country for Congress to address the rights of artists and the royalties it would value."

The Copyright Laws were enacted to promote and protect the creation of literary, artistic, musical and other works. Yet as work-for-hire clauses depriving all artists of not only basic creative rights but also many economic rights, they work, and in many cases, are forcing them to abandon their careers."

Our next step is to encourage Senator Cochran's colleagues to join him in support of creators' rights and urge the Senate to hold hearings on this bill. We will also be urging the House of Representatives to act on work-for-hire reform.

WHAT YOU CAN DO TO HELP

This year, we want to take you to Washington to tell legislators your story about what it is like dealing with work-for-hire day-to-day. You can help educate them about the intricacies of policy, social practices for artists, photographers and writers. You can motivate your associates to create change.

1. If you've had experience with work-for-hire contract as and we'll add your voice to our testimony.
2. Write to your representatives and senators telling them the reform of work for hire is critical to your professional survival.
3. Add your name to the list of people who would like to come with us to Washington when hearings are held or when we lobby on the Hill.
4. Volunteer a few hours of your time for a work for hire phone, bank or mailing.

WE ARE NOT ALONE

We are finding and it is no surprise that we have a broad range of allies. As you look over the list of supporters of the Copyright Justice Campaign, you'll see a broad representation of professional workers. The Screen Actors Guild, American Federation of Television and Radio Artists, Actors Equity, the Department for Professional Employees of the AFL-CIO, District 65 of the United Auto Workers, The American Federation of Teachers, the Songwriters Guild of America, the Coalition of Interns and Residents and a host of artists, photographers and writers' organizations who have joined together to stand up for creators' rights.

BEYOND WORK-FOR-HIRE

The issues we've been working on become even more critical with the advance of new technologies in the workplace and the resultant debate on rights. The Congressional Office of Technology Assessment (OTA), a study arm of the U.S. Congress, has completed a two-year study, *Intellectual Property Rights in an Age of Electronics and Information*. Coalition members and other creators testified at OTA panels on creators' rights. Upon release of the study, Congress requested that creatives views be considered throughout the policy-making process. Congress rightly assessed that the policy that lawmakers discuss now will have a direct impact on the future of artists, photographers and writers.

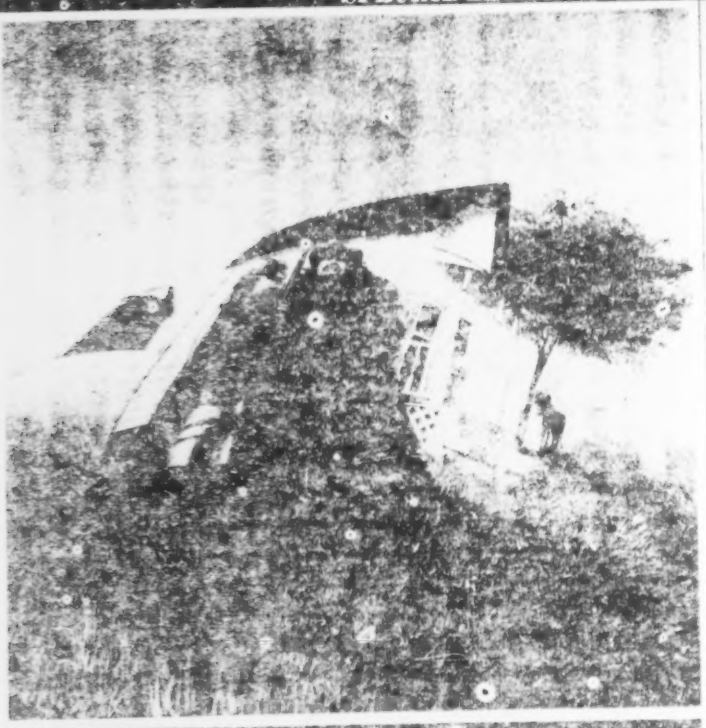
The Copyright Justice Coalition will continue to urge action on rights issues for creators. But we cannot meet this challenge alone. Your stories, your commitment and your support make the difference in our efforts. Join us.

Susan Doubet is the former executive director of the National Graphic Artists Guild.

ILLUSTRATION © 1987 BY GUY BILLOUT

6 THE GRAPHIC ARTISTS GUILD

SPECIAL EDITION



"THE COUPLE EVOKE A GENERAL FEELING OF SAD DETERMINATION, PERSONIFYING THE TENACIOUS..."

WORK-FOR-HIRE OR NOT FOR HIRE?

T

W4H AFTER THE FACT: THE REID CASE

A

Tales of a Freelance Artist, continued

them back or bargain for them. The law should be the opposite, that the r... ts are in the hands of the freelancer and the employer has to negotiate to buy them from you. My artwork belongs to me. The law says that the employer created the work. You have to beg for whatever rights you get under work-made-for-hire.

I was unable to stay in the comic book business because I could not work for Marvel or DC. I couldn't logically sign a work-made-for-hire contract. I had to open my own studio. I gave up $30,000 a year and had to start out fresh. I'm now doing fine as a publisher and I encourage others to go into business for themselves. The industry has changed. Now there are small publishers like myself, and I will never have to sign a work-made-for-hire contract.

... give up the right to have your work returned, unless it is returned as a gift. ... you give up reprint rights potential merchandising rights, movie rights and overseas sales. It is impossible to define what rights you might have given up. The publisher has taken all of them, whatever they might be. I have work returned to me. But I have to negotiate it back from you. The fight should not be to change the work for hire ... but rather to ... on the law to define what rights ... that is ... It is corrupting and unfair and should not exist.

... am known for ... I have been ... Sculpture ... Manzanar ... I have ... I have ... I have

SPECIAL EDITION

techniques, to develop new photographs. As a result, I developed a richness of style. All of this benefited my clients.

There has been a dramatic change in the last few years as companies in all areas of our business insist on work-for-hire. Of the 15 regular clients I had in the last 16 years, I lost five because of work-for-hire—that's one third of my client base.

It is like a brush fire. I live with the foreboding that one more of my regular clients will turn to work-for-hire. It becomes harder and harder to find clients who don't demand work-for-hire.

I cannot put time, effort, and love into photos which have resale potential and then have them stuck in a file somewhere and forgotten or, just as dreadful, have the client resell my pictures to others. My authorship rights and residual income go down the drain and I don't have a thing to say about it.

Why do publishers want us to do work-for-hire? They say they want revision rights and exclusivity. They can get all the rights they want just by negotiating fairly with us.

Why do they need work-for-hire? There is an old fable about a dog lying in a manger full of hay. An ox leans down to eat. The dog snarls and bites him. Day after day the dog lies on the hay while the ox grows thinner and thinner. "Why are you doing this?" says the ox, "You don't need the hay. You don't even eat hay!" "I don't need it," growls the dog, "but I've got it!" Is that why we are fighting for our professional lives, because of a dog in a manger?

Work-for-hire makes my future in the profession bleak. The future for new photographers is hopeless. Without our pride, without any assurance of future income from our work, we are no longer craftsmen or professionals or independent business people, but day laborers. This is true for all photographers in every area of the profession, whether publishing, advertising or corporate.

It is dangerous to our culture and our economy to deny creators the right to claim authorship and the ability to survive. Work-for-hire isn't necessary. The danger won't be over until the law is changed. ■

Michael Heron, Photographer

I have been a professional writer for 18 years. I have written magazine and newspaper stories, radio and television copy, edited books and magazines, and recently published my own book on organized crime. I am an associate of the Center for Investigative Reporting and I am the Vice President of the National Writers Union.

I believe that work-for-hire is a threat to the economic survival of American writers. It effects me personally, its spread would harm me further.

Let me give you an example. In 1978, I was contracted by a California non-profit organization to write a publicity manual for community groups. I accepted a low fee because it was a worthy cause and because they could not afford more. Later, the files were acquired by another organization which reprinted and distributed the booklet, and which later passed it on to other organizations which also reprinted and distributed it. It is the most widely used such book in California. On one version my name was misspelled. I never received more money, although one group offered me a free membership. Because it was a work-for-hire contract, I had no

Continued on page 10

business group, Community for Creative Non-Violence (CCNV), and a Baltimore, Md. sculptor by the name of James Earl Reed. Reed is an amateur sculptor, his works have apparently achieved considerable acclaim in this area. He was asked by Snyder to create a sculpture depicting the plight of the homeless for the Pageant of Peace in Washington. Reed and Snyder orally agreed that Reed would create the sculpture desired by CCNV, for which he was paid only the $15,000 in expenses required to cast the work in a special material. It was understood that Reed himself would donate his services to CCNV for the project. The court's finding of fact indicated that ownership of the copyright in the statue was not discussed, and was not addressed in any written agreement. There was some Reed testified, however, that Snyder had agreed that Reed would retain full copyright rights in the work.

Reed prepared a sketch of the statue, which consisted of a black homeless family on a grate. He then solicited persons to serve as models for the statue. At Snyder's suggestion, Reed modified his plan for the sculpture by depicting the family as one living rather than standing or sitting position.

Reed and a crew of 12 paid by CCNV worked on the sculpture for 6 weeks, with CCNV members monitoring the progress. When the statue was delivered to the Pageant, it was labeled Reed's copyright notice. Reed later obtained a copyright registration for the work.

After the sculpture was returned to Reed for repairs, an ownership dispute arose. CCNV then filed suit against Reed claiming that it owned the copyright in the statue. The trial court held that the statue was a work for hire and that CCNV owned the copyright thereto. Relying on the supervision and control test employed in Aldon, the circuit held that CCNV directed enough of this [Reed's] effort to assure that, in the end, he produced what they, not he, wanted, notwithstanding his creative instincts may have been in harmony with theirs." Displaying little regard for Reed's creative contribution, the court observed that Reed was engaged merely to "utilize his representational skills, rather than his original artistic version, to recreate [the sculpture]."

The *Reid* court reversed the presumption that Congress intended to codify in the 1976 definition for work for hire. That statutory provision essentially abrogated the "rights previous interpreters" have found that any work created or commissioned is not a work for hire unless the parties expressly so agree, and unless the work is one or indeed of the categories listed in the statute. In emphasizing that "Reid could have bargained with CCNV for the copyright but did not do so," the court turned the work for hire definition on its head. Under the court's interpretation, the artist is deprived of his copyright despite the absence of an agreement addressing copyright ownership, and despite the artist's non-receipt of statutory requirements such as copyright notice and registration.

The *Reid* court's interpretation of work for hire violates Congressional intent and the fundamental right of creators. Corrective legislation, specifically S.1223 introduced in the 100th Congress by Senator Thad Cochran of Mississippi, is critically important to prevent the perpetuation of the *Reid* court's distorted interpretation of work for hire. Such legislation is also needed to restore the rights of independent contractors to claim the benefits that the copyright laws were designed to assure them.

Charles D. Ossola is Legislative Counsel for the Copyright Justice Coalition.

COPYRIGHT AND THE AMERICAN DREAM

BY PAUL BASISTA

In our Constitution's Bicentennial year, the reintroduction of the *Copyright Justice Act* (S. 1223) by Sen. Thad Cochran (R-Miss.) on May 19, 1987 is an important and timely effort to restore the creative spirit which fulfills the American Dream and the vision of our founding fathers.

To realize the American Dream, an independent and innovative talent transforms a figment of his or her imagination into tangible form. With great risk, long hours of hard work and fierce competition, the rugged individualist earns the right to enjoy the results of those efforts.

Two hundred years ago, the framers of the Constitution recognized that for the infant nation to flourish, its creative and innovative spirit needed encouragement. After the long hours of debate which culminated in the blueprint for our government, the founding fathers also agreed:

To promote the progress of science and useful arts by securing for limited times to authors and inventors the *exclusive right* to their respective writings and discoveries. ***U.S. Constitution, Art. I, Section 8, Subsection 8 (Emphasis added.)***

AMERICAN SPIRIT; PERSISTENCE IN THE FACE OF ADVERSITY
DUE DATE: SKETCHES AND FINISHED ART, ASAP...

8 THE GRAPHIC ARTISTS GUILD

SPECIAL EDITION

Continued from previous page

This vision allowed the genius of America to flourish. Without the encouragement and incentives embodied in our Constitution, thousands of dreams might have remained only imaginary figments.

Under a work-for-hire contract however, a creator still competes, trades the capital, puts in the long hours and takes the risks, but the rights to that creation are transferred to someone who did not create it.

Intellectual property, which in recent years has been a positive factor in the balance of trade, will become even more important to our nation's competitiveness as we enter the "Information Age." Unless we encourage our nation to create, we will trail far behind those we once led.

The *Copyright Justice Act* supported by the Copyright Justice Coalition is a timely tribute to the vision of our founding fathers. By reforming work-for-hire, not only will we restore the spirit of the law that was intended by the Constitution's framers, but our nation's creative spirit will be acknowledging the exclusive right of creators to their creations, we are upholding the principles that the authors of hundreds of thousands of American Dreams can be fulfilled. ■

Paul Parrish is the Executive Director of the National Cowboy Artists Guild.

The following are statements from some of the organizations participating in the Copyright Justice Coalition:

AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS

BY HELEN MARCUS

As I time with the new technology, we reshape the contours around us as well as the final product. ASMP has communicated its substantive efforts on the Coalition's bill attempting to rectify the wrongs done by work-for-hire. In the process, we are creating a historical research within the fast moving business community we serve as a source for those rare whose voices about new and unavailable hearing in the public policy arena.

Assistants (whether in advertising or publishing) refuse to work as employees without the benefits an employee generally receives, and while we must still carry the liabilities of independent contractors, it is important that we make this standard practice. Work-for-hire not only cut workers, but for our profession.

These boilerplate work-for-hire contracts are one way for the client to say "I don't want to negotiate." When clients give us work I often purchase orders. They are telling us they don't want to negotiate. We are fighting this practice in order to support photographers' rights to negotiate freely on a sound economic basis.

The atmosphere of work-for-hire now permeates all negotiations. All of us know when we go into a room to negotiate with our clients, the law about work-for-hire walks with us. Eliminating the possibility of work-for-hire allows photographers to open up the negotiation process on an equal footing.

Creators have had to fight for their rights since Roman times. The fight for copyright ownership needs ongoing representation, not only in terms of work for hire but also in terms of other issues important to creators such as tax equity and moral rights.

We have begun to establish a track record on the Hill in legislative history this we must continue. If publishers succeed in a work completed or underground. This may be the only legal ways to defend our rights. It is a crucial time. We have been heading creativity.

Fighting a individual's has not worked against work-for-hire, negotiating each of these contracts client by client simply has not worked for most photographers. The Copyright Justice Coalition has enabled photographers to join with other creative professionals—artists and others—whose survival is also threatened by this law.

And the fight is now where it should be: in our legislative arena where work for hire was born in an honest but unrealized attempt to "balance" the scales in the marketplace. Work for hire has tipped the scales against us and we are working to get the balance back. ■

Helen Marcus is the president of The American Society of Magazine Photographers.

SIZE: 7½" x 8". CLIENT: NATIONAL GRAPHIC ARTISTS GUILD NEWSLETTER/SPECIAL EDITION...

ILLUSTRATION ©1988 BY ROBERT M. VERMAN

[illegible] of [illegible] public [illegible] resources. I do this primarily not because the individuals involved were [illegible] profiteering, but because [illegible] of this practice is unfair and [illegible] ...

The [illegible] work-for-hire [illegible] mines the system by [illegible] which I support my work. Over on top of [illegible] possible it possible for me to [illegible] a fixed, costly and probable [illegible]. Three years ago, for instance, I conducted a [illegible] investigation and wrote an article for a political magazine for $1,200. This article, in the use of same [illegible], took [illegible] a great deal of time, and I calculated that I had worked for less than $3 an hour. Because I owned the work, however, I was able to resell [illegible] some of the article to daily newspapers; this nearly doubled my take. This infusion of money came at a critical time and allowed me to take the time to finish my book.

Ownership of work in this case, and many other cases, means that writers can often work in areas which cannot be adequately funded, but which contribute to the political or cultural diversity of the written word. Author ownership, too, does not only aid the author and the public. It is also a boon to economically marginal publishers or publications—those enterprises which use the work of less commercial or beginning writers—who can share financial risks with the author.

It is not simply a matter of money, though. I am proud to own a collection of my own work. And, this ownership enables me to go back and rework earlier articles because I received new information or simply because I have had the time to think about it further. If all my work were work-for-hire, I don't think I would care much about the subject once the fee were paid.

What most writers strive for is the ability to pursue projects on the basis of merit and long term success rather than immediate gain. The ability to earn royalties from a body of work is what enables writers, particularly research writers, to take the time to think, to research, to write and rewrite. This is what guarantees breadth and depth of literature and reportage. The existence of independent writers guarantees a diversity of thought, and diversity supports all thought. Scientists have recently discovered to their alarm that the shrinking gene pool of the world's plant and animal species is a threat to the survival of us all. Likewise, reducing the financial base of independent writers will eliminate many such writers and narrow the nation's intellectual and cultural focus.

I have chosen to be a freelance writer not because the field guaranteed me economic gain or security, but in spite of hardships. I did, nonetheless, expect that the players would adhere to certain rules. Work-for-hire is contrary to the rules, to tradition, and is simply robbery. It is ironic too that for years publishers have been crying about similar theft conducted by countries like Taiwan and the Soviet Union which have ignored accepted copyright agreements. The publishers, in their cases, have cited many of the same abuses that I am citing here, but they refuse to note that authors, too, have the right of ownership.

We are not being offered financial security in exchange for our ownership or rights. We are simply being denied. And one of the hidden rights is hope. Hope that we can achieve success through money, through fame, through the spread of ideas. Hope that eventually we will not have to choose to work on the basis of economic expediency.

FALL 1987

SPECIAL EDITION

but rather on other, more substantial, grounds. That we can gain what creative artists want and needs: time and freedom to create in accordance with our vision.

Please help us stop the use of this insidious loophole and return to us the ownership of our work.

Alec Dubro, Writer

I have been an artist for many years doing mostly work-for-hire and almost always employed full or part time in some other field just to pay the bills. For the past four years I have been freelancing full time as an illustrator of children's books. Because I have had only two books published in that time, I am still having to do work-for-hire, or "ghost illustrating," as I call it, a situation where I draw for someone else and they put their name on it. My financial situation fluctuates between critical and desperate, and I so often my visions for my own work dim in my despair.

By Florence Score Mitchell
Illustrator

Although I am an illustrator with over 25 years of experience in the business, I was threatened by a major corporation that I would not be hired in the future and I would not be paid for work I had already done because I didn't want to do work-for-hire. It was the most outrageous and blatant example of strong-arm tactics.

I had worked very infrequently for CBS—only four or five times during the last ten years. This was on an assignment to do an album cover. In the past, I sold only reproduction rights and if the company wanted to own the work, I sold it separately.

But in the interim since I'd last worked for them, CBS apparently felt themselves to be losing something to their freelance help and decided to make the signing of a work-for-hire agreement mandatory before commissioning any art work (photos included); in my circumstance I feel that there was some kind of slip-up in the process. I was not given a contract, nor was I told that there would be one forthcoming. It was not until CBS was over six months late in paying me and after I had submitted several invoices—all of them somehow lost or misplaced—indeed after I billed them for $98 in finance charges—that this ex post facto document was sent to me.

The CBS lawyer-accountant who spoke to me said: (a) I would not get paid unless I signed the contract, (b) I could never work for CBS records until I agreed to work-for-hire contracts as a matter of policy, and (c) the protracted legal problems I would face to get paid would not be worth the relatively small dollar amounts being billed for.

In this case $2,000 was involved and I had no recourse but to sign a work-for-hire contract. Small claims court will only deal with $1500 and it was not enough money to be worth paying legal fees. In the future I will refuse to do work-for-hire for CBS.

I have worked for Time magazine for many years. Time sent work-for-hire contracts to all the artists who do work for their cover. The cover of Time is seen by 20 million people and is enormously prestigious. It is an icon in American journalism. One artist of some distinction didn't want to jeopardize his standing and signed under protest. I did not send back the contract and did a cover for them under a normal contract. Time didn't really pursue it. However, I was anxious that the special relationship I have with them could be jeopardized. They never pressed me, but if they had, I might have been under the gun and might have signed under protest.

I don't want to be a hero. I am vulnerable to pressure if the stakes are high enough. It is nevertheless clear to me that the way to stop this unfair practice is through legislation. But first there needs to be awareness.

Why bother, you ask? Well, for one thing, the corporations are paying terribly little for what they are getting. Secondly, they're undercutting all other wage scales that have been established painstakingly over the years, and which often are still incommensurate with the real value of the artwork produced. Advertising art, though it has been upgraded in the last few years, is still paying only about 10 percent of the billing, and yet often provides more than 80 percent of the visual pull of the ad. If you sell the art work and the copyright for money now offered for one specific reproduction right, you are undercutting yourself and providing the purchasers with another weapon to competitively downgrade the prices paid for art.

By Burt Silverman, Illustrator

Every day one reads of another American industry, business or institution losing out on the international field of competition. As an American photographer, I am concerned, especially at this time in our history, when our national creative community holds the vanguard. The survival not only of individual artists, but of America's pre-eminent position in the field of visual arts is being threatened by "work for hire", a short-sighted, legalistic revision of laws already passed by Congress.

"Work-for-hire" means I lose control forever over the pictures I take. In the next year an exhibit of my photographs of America will travel all over the world. Had I been required to "work-for-hire" during the thirty years of shooting it took to assemble that body of work, many of those images would have been lost to me and to the public.

It is difficult to describe how divisive, destructive and insidious "work-for-hire" is for photographers, whether they have been in the business thirty years or thirty days. It deprives us of future earnings from our work, because it robs us of our authorship. We see our creative efforts exploited in context we never envisioned by third parties we've never met. In the worst case, we may never know when and how our work appears.

Current national policy regarding copyright reinforces the classic American entrepreneurial approach to business. It encourages young artists to work hard, to take risk and invest in their own economic futures because it allows them to retain ownership of their creative product. It enables them to eschew short term gain in the service of building a body of work. "Work-for-hire" corrodes America's creative community by imposing a current cash basis on its economic security. If a photographer must relinquish the rights to his photographs once the shutter closes, his horizons shrink to the diameter of his current paycheck. But, if he retains the rights to his work, he has the incentive to work an extra day, shoot an extra roll or risk an innovation because years from now it may pay off for him both artistically and financially.

That's the attitude which has kept America's creative horizons unlimited and made us the dominant force in international art. We cannot afford to discourage young talent from entering the creative field nor allow established talent to be forced out by the artistic and economic disincentives "work-for-hire" creates.

Among the many flaws in this fantasy is denial of the fierce individualism which characterizes creative Americans. The intent of laws protecting the rights of individual artists - no matter what the language - must be to bring the negotiating power of those individual into greater parity with the power of huge agencies and corporations. If the spirit of that intent is circumvented, the letter of the law will be unable to prevent the exploitation and ultimate deterioration of America's creative community.

Jay Maisel, Photographer

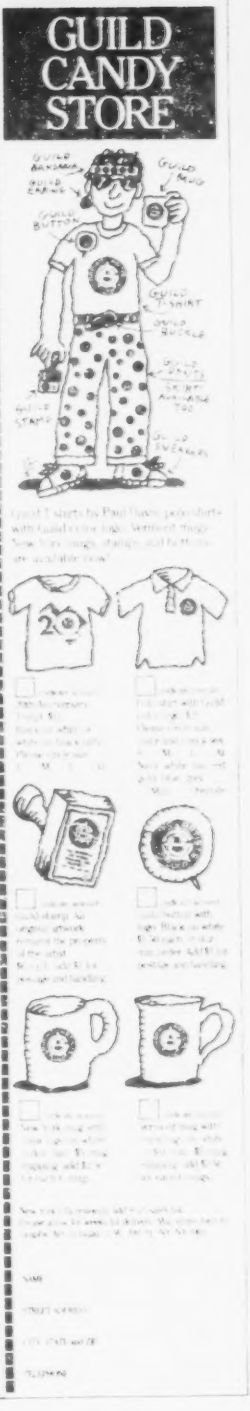
During the last couple of my 20 years as a medical illustrator, I have been offered nothing but work for hire contracts by textbook publishers. My latest experience was with Holt, Rinehart, and Winston. I had taken an assignment from them to do some illustrations for an anatomy textbook for children. The pay was not exceptional—$1900 for two or three illustrations. As the assignment was a rush job, I had almost completed the work when a four-page work for hire contract arrived in the mail. It was a printed standard form entitled "Independent consultant agreement." I crossed out the work-for-hire clauses and sent the contract back.

During 1983 I embarked upon what turned out to be a year of fruitless negotiations with Grune and Stratton, Inc. involving a work-for-hire contract. I had been asked by a doctor with whom I had a good working relationship to do the illustrations for an obstetrical gynecological surgery textbook to be published by Grune and Stratton. I received a form in the mail from the publisher that was a work for hire contract. I said I couldn't sign it.

Then I received a call from a lawyer from Grune and Stratton. During the discussion with the lawyer, I offered to negotiate to sell some individual rights to them, such as foreign publication rights or other specific rights they needed. I asked her whether, in fact, Grune and Stratton needed to have movie rights and T shirt reproduction rights for ob-gyn illustrations, as under work-for-hire, they would retain these rights and more. I insisted that I retain ownership of the work and that it would have to be returned to me. The lawyer was intractable. It was work-for-hire or no job. I had to write back to the doctor telling him that if lawyers were taking over the publishing business, the lawyers would have to illustrate the book (if they could get their lawyers to sign such a contract), because I couldn't do it.

That was the end of the project. I lost the estimated $10,000-$15,000 I would have received from the book and the good working relationship I had developed with the doctor involved ended.

Another recent example is a textbook publisher in the midwest (Brown) which sent me some work to do in a big rush along with a work-for-hire contract. I contacted them to say that I could not do work-for-hire. They refused to negotiate the terms and fired me from the assignment by leaving a message on my recording machine. This was a job that



THE GRAPHIC ARTISTS GUILD

SPECIAL EDITION

Tales of a Freelance Artist, continued.

would have paid $5,000-$6,000.

It has come to the point that even with my 25 years of experience, I may have to decide that I can no longer do the work I was trained to do. Since 1983 I've about every contract I have been offered in textbook publishing has been work-for-hire. I had to send back four of the such contracts in 1983-84 alone. It's either work-for-hire or no work at all and there is little chance to negotiate any other kind of contract.

A good anatomy textbook is about 50 percent illustrations and an atlas 80 percent. Under work-for-hire, the publishers become authors of the work by law. They can alter the artwork, paint over it, rearrange it, use it again and again. It's more than the question of financial compensation — the integrity of my work is at stake. People have a right to expect a certain quality of work from me. I am not unknown in my field. I am Director of Anatomy Labs at New York University. I have a Masters Degree from the Johns Hopkins School of Medicine and a Ph.D. from the University of Chicago. I prefer to do the kind of functional medical illustrations I was trained for and it would be heartbreaking to have to leave this business. But the business is leaving me.

I have fought against work-for-hire since the beginning. It is not just young people starting out who are being affected by this law — it's all of us. ■

By Doug Cramer, Medical Illustrator

Once I had a wonderful job as staff photographer for a monthly magazine. I was given a seemingly unlimited budget for travel within the state, all the Kodachrome I could shoot, all the latest Nikon cameras and lenses, and complete freedom within the editorial purview of the magazine, which was the Texas outdoors — landscapes, parks, fish, wildlife and outdoor sports. I was paid a decent salary, my employer contributed jointly with me to a retirement fund, social security, and to a life and health insurance plan. I was given sick leave, had workmen's compensation benefits, vacation time, periodic pay raises, had office and studio space, all the usual employment benefits.

The job was a wonderful experience, and I did some of my best work there, but after a few years I began to grow dissatisfied. I was pouring my time, my energy, my soul into the creation of those photographs, and they belonged to my employer. That was part and parcel of being an employee, and in return for that I received all the above benefits, but it still was not enough for me. I quit the job to freelance, began to build a business for myself, to acquire my own equipment, rent my own studio space, buy my own insurance, pay my own self-employment tax, health and life insurance, save for retirement, unexpected illness, and all the contingencies that being in business require.

It was many years before I could put together anywhere near all the equipment, facilities, and benefits that I had had in that job with the magazine. But I did have the one thing that I lacked in that job — ownership and control of my own work. Performing as an independent contractor to a client to produce specific work for specific usage, I could do what I wanted with that work after his needs were fully taken care of. I have been able to sell photography as stock, generate magazine stories, exhibits, even books from my past work without asking anyone's permission to use it. My gratification as an independent photographer is in creating and controlling a body of work that grows incrementally as I grow as an artist and that records and defines my life as a photographer.

Now, a strange thing is happening. After fourteen years of building a business and creating and defining a body of work, a stock file for myself and a legacy for my family, I am being asked by clients to sign contracts to perform something called "work-for-hire," presumably provided for by the Copyright Law of 1976. The interesting thing about "work-for-hire" is that for purposes of copyright ownership it makes me an employee of the client, meaning that he is the creator and owner of the work. So I am back where I was with the magazine-job, right? Wrong. Under work-for-hire it is only for purposes of copyright ownership that I am an employee. For all other purposes I am an independent contractor, meaning the client has none of the usual obligations of an employer to an employee. Meaning I get to take all the risks and bear all the expenses of being in business, get to pay for all my own benefits, fund my own insurance and retirement, etc., and the client gets ownership of the work. It's the worst of both worlds and a subversion of the original intent of the Congress to award ownership to the creator.

Well the deal was not good enough when I was a bonafide employee, and it is certainly not good enough under the perversion of "work-for-hire". The great satisfaction of an artist is in the creation and control of his life's work, and control means copyright ownership. Without that ownership we do not have a body of work, nor do we have a legacy. We have only today's shoot and the hope of another shoot tomorrow until we're too old or too tired or too discouraged to keep shooting.

The simple and only solution is not to do it. Simply do not sign a work-for-hire agreement. Negotiate a contract for a fee for specific usage. The client should know what usage he needs, and should be willing to pay a reasonable fee for that. Even if he needs unlimited usage, a mutually agreeable price can be negotiated, but do not agree to perform work-for-hire.

Work-for-hire is an effort to subvert the intent of the Copyright Law. Should work-for-hire become customary practice in our industry, it will lead to the loss of one of the most fulfilling and rewarding aspects of a career in professional photography. We will be robbed of our life's work.

I won't sign. If you care for our future, you won't either. ■

By Reagan Bradshaw, Photographer
President, ASMP/ASA

For some 30 years, my work has appeared in many newspapers, magazines, and anthologies.

Occasionally the Reader's Digest has requested my permission to reprint cartoons, a consent I was most happy to grant to this fine magazine. But in November 1983, it came as a surprise to find one of my cartoons in a Reader's Digest ensemble entitled "Pajama Games," no similar request for reprint permission having been received by me prior to this use. I had sold that cartoon to Saturday Evening Post in 1939 under its well-known policy of one-time use only. That policy was confirmed, as always, by prompt return of the original artwork upon publication. I have first drawing in my possession.

The Saturday Evening Post had been purchased by another publisher many years after 1939 and instituted a work-for-hire policy that somehow is construed to include everything that has ever appeared in that magazine', long and illustrious history. The magazine must have received the customary request from Reader's Digest and proceeded to act as though it held title to my cartoon. I cannot find this construction to be acceptable, and so told the publisher in a letter. There has been no reply. What happened to me is illegal. But it happens all the time, everyday to artists under the sanction of the law.

This loss of a transaction rightfully mine comes about, I believe, as one of the many direct results of a work-for-hire policy that is unfair to contributors to publications and detrimental to their welfare. If it is considered that all workers appearing in the Saturday Evening Post are forfeited for all time by their originators, the body of material must be in startling proportions. There is a delicious irony in this since the Saturday Evening Post today seems to find comfort in the glow of the Norman Rockwell image of an American in which mutual trust and support are the hearthstones.

Today I do not release my work to any use requiring consent to work-for-hire. In principle and in practice it is an outrageous stipulation. But younger artists struggling to build a career in such a highly competitive field may not be in a position to enjoy this option to submission and under the duress of necessity find themselves obliged to forego any say in the future disposition of their efforts.

Memory does not tell me that this work-for-hire condition was a major problem when I started in this business but if it existed it was confined to the lower tiers of the market and so would prove to be of minimal consequence. I see no reason whatsoever for the practice to continue. Our work should be considered our own property without variances. The law should reflect this fact. ■

By Herb Brammeier, Freelance Cartoonist

Representing artists and photographers for many years, I had little difficulty negotiating contracts until the issue of work-for-hire started to come up.

In the past year alone, I had four problem situations with publishers and advertising agencies making an initial demand for work-for-hire, some waiting until the job was completed before exerting the work-for-hire pressure. Of the four clients, one backed down after I explained my position to their attorney, two required the assistance of my attorneys to collect payment in lieu of the work-for-hire requirement which resulted in no additional work from them, and the fourth would not give me the assignment because I refused to sign the work-for-hire contract in advance.

The most blatant abuse of our rights came from one of the Condé Nast publications, who made it perfectly clear that no work would be awarded unless a work-for-hire contract was signed in advance. My refusal to sign resulted in no work from that company.

Of the two clients who made work-for-hire demands while the work was in progress, Children's Television Workshop was the most outrageous for using the technique of starting us on the project and then springing on us "all rights" or work-for-hire contract, then balking on the payment, unless the contract was signed. This unfortunate situation requires legal assistance, the cost of which has to be borne by the artist's representative, who is already working on a small percentage.

As long as the company policy of publishers and advertising agencies requires the work-for-hire demand, there will continue to be a severe dislocation in the normal transaction of business of buying and selling creative works. Prior to the change in the Copyright Law, everything seemed to be above board between the commissioners and their freelance creators. However, the provisions of work-for-hire in the new law seemed to give the publishers and agencies the excuse to manage, manipulate and cheat the artists and photographers out of their fees and rights of ownership.

Unless the Copyright Law is amended to restore a fair and equal bargaining position between commissioners and creators, this chaos will continue to disrupt the creative marketplace. Freelancers are not work-for-hire employees, but this new law has given the commissioners the opportunity to treat freelancers as such, but without the benefits and respect they would normally give to their own employees. ■

By Jerry Anson, Artists Representative

Work-for-hire Legislative Alert!

In May of 1987 we the Graphic Artists Guild [illegible] out of work [illegible] the Senate and [illegible]

"...work for hire [has] been misused [illegible] to deprive freelance artists of their ability to obtain full economic benefit of their creations. Our copyright laws were enacted to promote and protect the creation of artistic works, but they are depriving artists of much of the income generated from their work."

[illegible] Graphic Artists Guild [illegible] Artists Guild is continuing [illegible] to [illegible] and support [illegible] to [illegible] same spirit with [illegible] during this [illegible] budget.

[illegible] we are working [illegible] to [illegible] [illegible] to [illegible] the [illegible] [illegible] [illegible]

SPECIAL EDITION

A year ago Lurex contacted by Harcourt, Brace, Jr nov-ariish to do some illustrations for a French textbook. The pay was low—$350 for five black and white illustrations, but I accepted the work, because I was interested in doing more day-to-day kind of illustrations than the ritzier images of ad work. Never having worked before for a textbook publisher, I assumed the best.

I started the work, and pressed the art director for a contract. She was very nice and sympathetic, but told me she needed four different signatures on the contract and someone was always out of town. Everything was disorganized, she said, because the company was moving to Florida.

I was stunned by the contract. They wanted everything, and didn't say a word about it upfront.

I immediately went to the office with my completed illustrations and took out a red pen and started crossing out sentences in the contract in front of the art director. She got real upset and said: "Please don't do that. You'll make my life difficult and it's already difficult enough." I told her it was difficult for me, too. "You people want everything, and you're giving me nothing," I told her. "It's too one-sided. I'm not even making expenses here."

I felt like I had been dropped into a sweatshop in the middle of the garment center, or caught in a time warp and transported back to the 1930's. I was trapped. I had finished the work, I had no one else to sell it to, and the contract was not negotiable.

The art director said the company was extremely pleased with my work, and though she said she thought it was unfair, work-for-hire was a company policy and that was that. I had no choice but to accept their terms. At least I got my original artwork back eventually, thanks to the art director. She used to whisper to me over the phone about that because it was against company policy. I couldn't believe it. It was like being in Russia with the secret police listening in.

It's very important to me to get back my original work. I reuse the original to get more jobs for myself by publishing my illustrations in talent directories that buyers use to find artists. I get a much higher quality image when I print the original instead of a reproduction. It's professional suicide for me to sell for a few hundred dollars a work that could bring in thousands of dollars of new business.

Another time, after I sold ten illustrations to an ad agency, I asked for the work back. They told me: "We paid for the work, we're keeping it." I ended up going to court to get back my creation. Legal fees were $2500, and the job paid $2500.

I don't do this work for fun. I'd rather be out playing ball. Illustration is work, and it's work in a very competitive industry. I'm good at what I do and I deserve to get a fair shake for my labor.

I make about $27,000 to $30,000 a year, but some years have made only $20,000 because I turned down work-for-hire. I just can't work under these kind of conditions. I have deliberately arranged my life so I can usually afford to walk away from work-for-hire. I have no family to support and I live simply. Other artists can't do that.

What was a loophole in the Copyright Law has turned into a whole world of trouble for artists. Work-for-hire has become the standard form of more and more contracts.

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TERMS: THE WORK SHALL BE DEEMED A WORK-FOR-HIRE. COMMISSIONED PARTY SURRENDERS ALL RIGHTS...

SCREEN ACTORS GUILD

BY JOHN T. McGUIRE

The Screen Actors Guild supports reform of the work for hire provision of the Copyright Law. While our members may not be affected directly by this practice, the underlying issue of the rights of creative artists is of major importance to all performers.

The Copyright Law in this country has served to provide a measure of protection to artists through the years. We must not allow such practices to exist, therefore, that evade the spirit and letter of such protective legislation.

Exploitation of the work product of the artist beyond its initial scope and intent must be subject to that artist's consent and participation in the proceeds. ■

John T. McGuire is association national executive secretary of the Screen Actors Guild.

ASSOCIATION OF MEDICAL ILLUSTRATORS

BY WILLIAM B. WESTWOOD

Work for hire contracts present freelance artists from realizing their full potential of the considerable creative abilities. Further, these discriminatory contracts denigrate artists' abilities and contributions to the advertising and publishing industries by implying that artists are only technical renderers under higher "creative direction." Such an implication grossly belies the truth.

The Association of Medical Illustrators (AMI), a partner in the Copyright Justice Coalition, is unambiguously opposed to the use of work for hire contracts in any freelance situation.

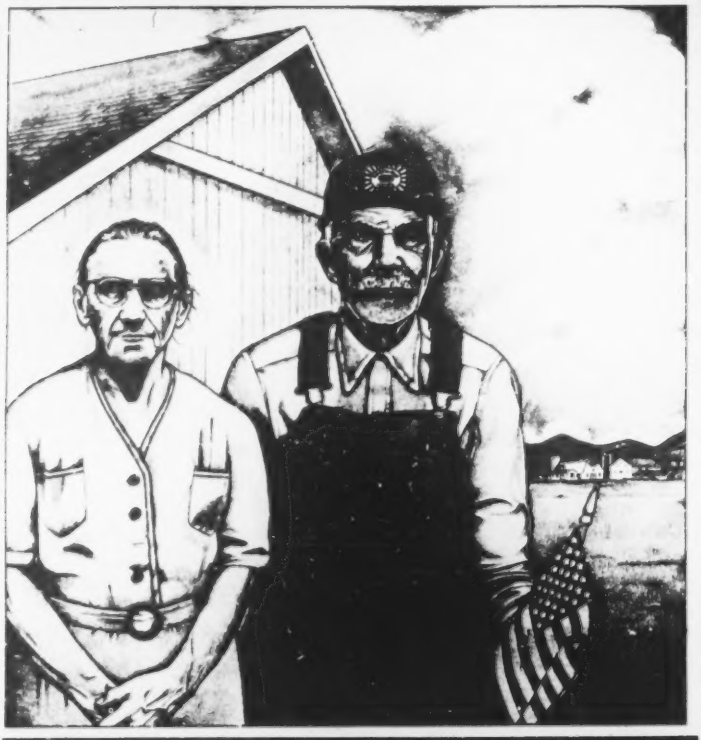
The AMI is a non-profit, professional association, organized in 1945. Its approximately 700 members are highly trained and concentrate their artistic efforts in one of the most specialized areas of the graphic arts. Because of their extensive knowledge in science, medical illustrators frequently do much of the research and conceptualization for their clients in the development of graphics projects. It is therefore highly ironic when they are pressured to sign work for hire agreements on the basis of the commissioning party's supposed control or supervision of the project at hand. It is often the medical illustrator who develops the concept and explains to the commissioning party how it works.

The AMI's Board of Governors unanimously passed an official resolution against work for hire at its 1982 annual meeting. This resolution was subsequently voted on and passed by the membership.

In concert with the Copyright Justice Coalition, the AMI continues to put forth much effort in an attempt to bring the injustice of the current uses of work for hire to the attention of members of Congress. This effort also has the support of several hundred of the country's leading physician authors who have written Congress on our behalf. This coalition of artists' groups representing thousands of artists nationwide is dedicated to the elimination of work for hire and other unfair trade practices used in the graphics arts industry. The abuses that are rampant today must not be allowed to continue. ■

William B. Westwood is a past president of the Association of Medical Illustrators.

SPECIAL EDITION



AND FOR PURPOSES OF COPYRIGHT, THE COMMISSIONING PARTY IS DEEMED AUTHOR OF THE WORK.

AMERICAN SOCIETY OF JOURNALISTS & AUTHORS, INC.

BY DODI SCHULTZ

Why do we support reform of the work made-for-hire provision of the Copyright law of 1976? The Copyright clause of our constitution clearly intends the creators of original works to enjoy the fruits of their labor in order to encourage the creation of such works. Under the "work made-for-hire" provision of the Copyright Law of 1976, the creator of a work such as a magazine article may have that creative role wrested from him or her while the mantle of "author" is settled upon another party and the actual author is deemed an "employee," albeit enjoying none of the benefits normally due an employee. Such works as magazine articles have value beyond one-time publication, with a potential for republication in digest periodicals, anthologies, and the like. Remuneration for repeated dissemination of these works should accrue to their authors, not to others who have unjustly assumed that title. This situation has been especially onerous for emerging talents who do not yet possess the stature and financial resources to resist the coercive bargaining power of publishers from whom they must seek assignments. The American Society of Journalists and Authors, representing our nation's independent nonfiction writers, believes that amendment of the Copyright Law, assuring creators the protection promised by our constitution, is urgent and imperative. ■

Dodi Schultz is president of The American Society of Journalists and Authors, Inc.

NATIONAL WRITERS UNION

BY KIM FELLER

The National Writers Union (NWU), representing 2,000 freelance writers, including book authors, journalists, poets and technical writers, strongly opposes work-for-hire, both in theory and in practice. Whether the product is written, oral or visual the plight of the creator remains the same—to survive in a society where all the arts are undervalued and underfunded. Recent statistics, in fact, place approximately 10 percent of the artistic community near the government-established poverty level.

In addition, the outlets for creative work are increasingly controlled by large corporate entities, reducing the bargaining power of the individual creator. This is certainly true in the publishing industry where major conglomerates now predominate.

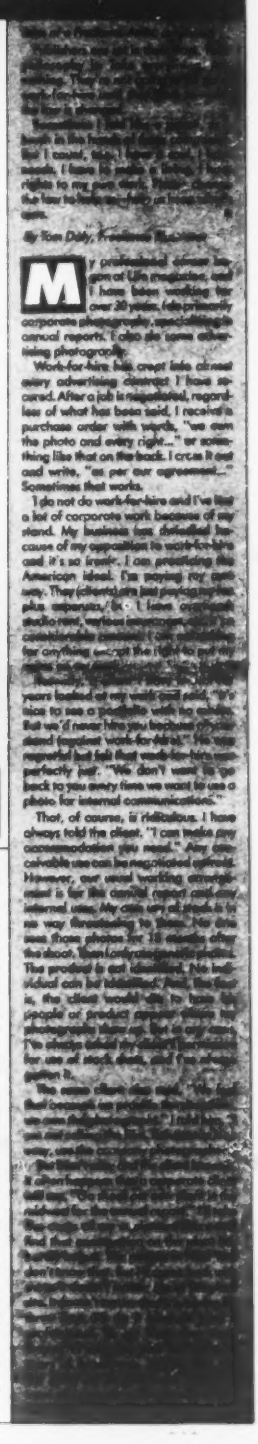
The NWU has found substantial pressure exerted on writers to accept work-for-hire agreements, particularly in the case of articles contributed to magazines and anthologies. However, there are also numerous instances of book publishers seeking extensive rights to the work of authors. A recent, shocking example is, *And Ladies of the Club*, where Ohio University Press retains all rights to the book, following the death of the author, in other words, the author cannot will her interests to anyone.

Without adequate protection against work-for-hire contracts, the writer is deprived of any income beyond the initial sale and especially in the case of younger or first time authors, this loss of financial support is catastrophic. Not only are newer writers unable to command an initial sale price that would justify this loss of residual income, but the advent of new technologies has made it difficult to assess the potential of any given work, or the extent to which it may be reutilized in different formats and diverse media.

Faced with few publication options, the writer is vulnerable to pressure from a publisher who will frequently make work-for-hire a contract precondition. Hence, without clear protection of the Copyright Law, the writer's ownership rights are handed over to the publisher, and the writer, in essence, enters into a state of indentured servitude, whereby all future financial rewards from the work accrue to the publisher rather than to the creator.

For these reasons, the National Writers Union strongly supports revisions in the Copyright Law, to protect writers and other artists from the insidious use of work-for-hire clauses, and to retain for the creators, the right to appropriate remuneration for the use of their labor. ■

Kim Feller is executive director of the National Writers Union.



By Tom Daly, Freelance Photographer

My professional career began at Life magazine, and I have been working for over 30 years, fulfilling primarily corporate photography, annual reports, annual reports. I also do some advertising photography.

Work-for-hire has crept into almost every advertising contract I have scanned. After a job is negotiated, regardless of what has been said, I receive a purchase order with words, "we own the photo and every right..." or something like that on the back. I cross it out and write, "as per our agreement..." Sometimes that works.

I do not do work-for-hire and I've lost a lot of corporate work because of my stand. My business has dwindled because of my opposition to work-for-hire and it's so ironic. I am practicing the American ideal. I'm paying my own way. They (clients) are just paying my fee, plus expenses, (i.e., I have overhead, studio rent, various assistants, etc.) to consistently produce [illegible] for anything except the right to publish [illegible] my own [illegible]

[illegible] years looked at my work and said, "It's nice to see a portfolio with no nudes. But we'd never hire you because you're a dead loser work-for-hire." He was respectful but felt that work-for-hire was perfectly fair. "We don't want to go back to you every time we want to use a photo for internal communications."

That, of course, is ridiculous. I have always told the client, "I can make any accommodation you need." Any conceivable use can be negotiated upfront. However, our usual working arrangement is for the client to report on any internal use. My fees are at stake in no way threatening to them for one use, those photos for 10 months after the shoot. Then I only charge for reprints. The product is not abandoned, the individual can be identified. And, the fact is, the client would like to have [illegible] people or product [illegible] their photographs [illegible] I'm always willing to negotiate for use of stock shots, and I'm always open to it.

The most often [illegible] I [illegible] [illegible] [illegible]

FALL 1987

SPECIAL EDITION

After all that, the same client said, "You know, we're not satisfied with the work that's being turned in lately." He simply couldn't make the connection between work-for-hire and a decline in quality.

Those who have blanket work-for-hire contracts are the ones that use the most stock. Where do they think that stock comes from? Work-for-hire is affecting art directors and corporate people as well as photographers. If I can get the time with some of my corporate people and explain the nature of the work, they usually respond, "I had no idea what the copyright meant to you." But, they blindly go along with the legal department which formulates this policy.

It isn't just the money, of course. The money usually goes back into the business. After the money is gone, there is only the picture. And if they take that away, then why do it? Just for the money? I am a professional. I can't do a bad job just to cut corners for people who want to underpay. But they are underpaying. Photo fees in New York are coming down. Some clients will pay for quality, but not many. There is all this pressure to give in and say, "I'll do anything." So far, I haven't done that; so far, I'm staying afloat, but I don't know how long I can last. ■

William Rivelli, Photographer

A company, which no longer exists, had been buying my photos regularly. I had a good relationship with them, and they with me. But this time, after we had worked out the budget and schedule for a series of photos, they handed me a new contract. This one had clearly printed on it that the work was being done for hire, and that they could keep the negatives. I was appalled. I had never signed a work for hire contract with them. What is more, I hated the idea of giving up the right to my negatives.

I explained this to them. I told them that if they had the negatives, they would be responsible for having any future prints made. No one could print the photo as carefully as me. No one else knew the lighting of the original shot. It was quite likely that if they tried to reprint from those negatives, they would wind up with inferior photos. Then, I explained, what if some future manager who didn't know my work was looking through the files to find a photographer for a project? He would take one look at the badly reprinted photo and say "who shot this picture?" The manager is likely to consider only who shot the photos, not who printed it. The responsibility for a bad print, through ignorance, would likely fall on me. He would look at the back and he would see my name "Dana Sigall." That would be the end of my work for the company.

I offered to sell them whatever rights they would need, but not the total surrender of rights and negatives implied by a work-for-hire agreement. They said that they understood, but that they would have to check with their superiors. After that, I went through several levels of people. I was finally told that the lawyers insisted on work-for-hire. It was the final word. In fact, the lawyers were upset that I hadn't signed away all my rights to the earlier works. The clear message was that I wouldn't get future work if I didn't agree to sign.

I signed and I did more work for them. I couldn't afford not to. They were one of my major clients. Suddenly, I found out that the company was gone. It had been bought out by another firm. My negatives were gone. I tried to trace them. I tried to contact the company—nobody knew where they were—they were somewhere in their files, with some department. Somewhere, someone has my negatives, and can reprint my photos any way that they see fit. They can use my name or not. Those photos have gone completely out of my control. I don't even know who controls them now. I have no recourse, because I had signed a work-for-hire contract.

It is getting worse and worse. More and more companies try to make you sign a work-for-hire clause. I try to fight it. Sometimes, I do have to accept it. I don't like it, but when I look at my accounts receivable, I have to live.

I have lost money from signing for-hire agreements. It could have been worse, but I am young. I don't depend on stock sales of my pictures to keep me going. The money I've lost is from not being able to resell prints of my work. A photographer who has been around for a while hopes to have built up a large number of stock pictures. He depends on the sale of those stock photos to live. That is his annuity. If he sells his work outright, he has nothing. ■

Dana Sigall, Photographer

In early 1982 I received a call from Intentional Education, a company that supplies design and art to textbook publishing houses. In this case the client was Fawcett in Chicago. The publisher had asked that all the work be done under a work-for-hire contract arrangement. I found this out after having gone in and discussed the job and price, and even agreeing that I would sell them all rights. I was then asked to sign a work-for-hire contract.

I told the art director that I would not sign it, even though I was willing to sell all the rights they needed. The price would have been reasonable for first-time use, not great for all rights, but I told her that I'd like to do that job and so I'd go the extra mile and sell the rights and even let them have the original art. But signing away the "creatorship" was for me a moral or ethical issue. Even though I was willing to bend and sell them all the rights they needed, they still said they needed my signature on the work-for-hire contract.

I decided not to do it. I feel it is denigrating to do work-for-hire. I lost the job and, of course, lost the money it would have received.

Another time I was contacted for an assignment by Rodale Press, which publishes both magazines and books. They sent their standard publishing contract, which is work-for-hire, even though the work was to be for one of their magazines. I explained the difference between work-for-hire and all rights to buy out and they said I could cross it out from the standard contract. We made an agreement for one-time use only. Later on, I received an assignment from

COMMITTEE OF INTERNS & RESIDENTS

BY JONATHAN HOUSE, M.D.

Work for hire has been the rule rather than the exception in medicine. Of course, it allows employers to circumvent the legal protections and interests under [illegible] copyright law. Work for hire is applicable to employees who create [illegible] within the scope of their employment. Perhaps more important, work for hire is applicable to independent contractors who specifically, affirmatively and knowingly [illegible] their rights as authors and the [illegible] of their work and the [illegible] of their product.

We are [illegible] that we had had to [illegible] our own work as part of caring and thoughtful [illegible] and [illegible] as a valuable asset [illegible] to [illegible] and [illegible].

The Committee of Interns and Residents, representing over five thousand physicians in New York and New Jersey, is joined in this action by the Congress [illegible] which is supporting the Congress. Andrew Stern, M.D., is the executive director of the Committee of Interns and Residents.

AMERICAN FEDERATION OF TEACHERS

BY ALBERT SHANKER

[illegible] the [illegible] [illegible] [illegible]

SPECIAL EDITION

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Tales of a Freelance Artist, continued.

another Rodale publication, Bicycling, and was offered a contract for one-time use.

In my two experiences with work for hire, the publisher held firm in one case and I did not take the job and, in the other case, they changed the contract. I'm not offered work for hire very often and I have enough work to turn it all down. If I worked more in publishing, I'm sure I would feel more pressure to take work for hire. I feel it is immoral to have to give up your right to say that you are the creator. If you allow publishers to buy up your stock of illustrations, it can put you out of business. They can end up owning a complete file of illustrations and they don't have to go back to you.

Artists should look upon work for hire as an unfair business practice. Even if faced with loss of income, I would not take work for hire. ■

By Jim Carson, Illustrator and Teacher

I am a freelance professional photographer, past president of the Washington, D. C. chapter of the American Society of Magazine Photographers and a member of the national board of directors. I believe that the increasing use of work-for-hire contracts is having a demoralizing effect on photographers and ultimately on our industry.

In recent days, when I do an advertising photography assignment and after a contract is negotiated, a purchase order arrives with the words "work-for-hire" written on the back. I invariably tell the agency, "This isn't what we've discussed," and so far I've generally had it removed.

Two years ago, I was faced with a work-for-hire contract after the work had been done. I had one major corporate client and had been receiving on the average of one job per month from them. I worked for a woman who adhered to ASMP business practice guidelines and everything went fine. One job originated in another department and was work from outside of the company. Specifically they asked me to shoot for a local dinner theater. I did one shoot, and reshot later. The theater people told me that the photos were being used for three mailers and I billed them accordingly. I submitted my bill and as the 30 days were up, the theater people asked my client, "Why has she copyrighted the photos?"

Six weeks after the assignment, I was handed a work-for-hire contract. The theater wanted to use the photos for a local magazine ad, and for TV spots and did not want to pay any more. I refused to sign and called a lawyer. After 11 months, I met with the client, the theater people and lawyers. My client said they would pay for all rights, and I raised the fee to cover an all-rights situation. After a period of time, I was dropped by the client.

I need the rights to my photos. I have a five-year old son and I am his support. The rights to my photos are my life insurance. Right now I make about 10 percent of my income from resale of photographs, but this will increase. If something happens to me, my son will have some income from this work - unless I lose all rights to my work.

The business is getting harder. Editorial clients are asking for work-for-hire, and at the same time there has not been much increase in fees in the last 10 years. Overall, people are suffering. Areas of photography that were once boom areas are now depressed as more and more clients move to work-for-hire.

The result is that many photographers are being discouraged. A gun is being put to their heads. ■

M. Christine Valada, photographer

Educational texts should not be exempted from the work-for-hire reforms. To exclude educational texts from the reforms would damage the careers of many of the most creative and hardest working illustrators in the nation who provide invaluable services to the educational process in our schools.

I have heard that some publishers have claimed that educational texts should be exempt from any work-for-hire reforms because they claim educational illustrations are not creative; that the illustrator merely graphically reproduces an author's or publisher's concept. I know that is false. Most of my work has been done for educational publishers and my clients require a great deal of creativity and stylistic originality for their books. In addition to stylistic innovation, my work must be technically accurate without plagiarizing the work of any other illustrator. Therefore, I must not only be creative, but also highly educated and knowledgeable in my subject.

The idea that publishers are the creators because they "dictate" the content and (therefore the creativity) of instructional material is ludicrous.

I am hired by publishers to do medical illustrations for their books because I know more about medical anatomy and related subjects than anyone on their staff, and I have considerable creative experience in my field. They rely on me to produce something unique and creative that will give their book a competitive edge in the marketplace. Of course, they specify what they want to see on a specific page, i.e. full color drawing of the anatomy of the digestive system in the human body, but the difference between a verbal description of what they want and the creative process of actually producing an original visual image based on their verbal description is vast indeed. If not, they would be able to produce the artwork themselves and would never require the services of freelance talent. The challenge of the educational illustrator is to creatively present factual visual information in a new and innovative or original way that will help stimulate the interest of the learning student.

The quality and creativity of illustration in a textbook is a more primary key to its success in the school book market and more importantly to its teaching effectiveness.

To exempt the work of educational text illustrators from the benefits of work-for-hire reforms would be a grave injustice, and I believe, a loss to the educational process in this country. It would force many good illustrators to leave the educational illustration field in order to survive economically.

The use of work-for-hire contracts is increasing. Almost every client I work for now requires that I sign a work-for-hire agreement on a take-it-or-leave-it basis, and I would rather leave it but I cannot afford to do so. Work-for-hire agreements allow publishers to treat my work like the work of an employee, wrongfully and against my will, and without even paying me benefits that I would receive if I were an employee. As a freelance artist, I must pay for my own benefits, such as health insurance, and a pension plan. Work-for-hire is a loophole of the law, which wrongfully permits publishers to take away my natural right to hold copyright to my original creative works and it thereby steals away my rights to financial gain from the use of my creative works.

I believe that the alternative of purchasing limited use rights would be easily workable, and unlike the work-for-hire agreements, which deprive the rights of artists, would serve the needs of both publisher and artist. Elimination of work-for-hire contracts is valid for all kinds of creative graphics and illustration, including that which is produced for educational texts.

When buying limited rights instead of work-for-hire, publishers or advertisers would only purchase their rights specifically suited to their needs, and the artist would retain ownership and copyright of his or her original works and the right to market other use rights to additional buyers, like magazine publishers as long as they did not conflict with the first buyer's rights, i.e., selling use rights to the first buyer's direct competitors.

Any additional use rights the first buyer would want to purchase could be additionally negotiated i.e. for audio-visual or wall poster use as a teaching supplement or advertising use. The first buyer might even desire to buy all rights including all use rights, the copyright, and ownership to the original art which would each be paid for separately. The use of work-for-hire contracts as currently being practiced, basically allows publishers to legally rob freelance artists and designers by allowing the publishers to "get it all" just for the price of the first time use rights.

We, who contribute a great deal to the quality of education and learning in the United States, are long overdue for proper legal protection of our rights in our creative works as has long been provided to creative people in other creative fields such as literature, music composition, and the performing arts. ■

By Leonard F. Morgan,
Medical Illustrator

My work in the music industry perhaps best exemplifies for me the need to know artist's rights and to understand the nuances of the artist/client relationship. To date, my work appears on approximately 36 album covers, on which my contribution ranges from the use of a photograph or illustration to the complete development of concept. Because the majority of my clients in this field are independent record labels which are located in many countries, I have had to establish a systematic procedure of negotiating with them in order to standardize, to some degree, the nature of our business transactions.

Because these are generally smaller companies, it is unusual for them to employ an art director or some other creative person who is versed in the Copyright Laws concerning visual artists. As a result, it is often necessary for me, as the freelance artist, to apply the business practices as accepted as standard by the art community.

Perhaps a few specific examples of situations which I have encountered would be helpful. Many record companies erroneously believe that an initial fee (often not a great amount of money) will enable them to use the visuals provided by the artist in any way, in any place, for an unlimited amount of time. The concept of copyrights on a piece of work being structured as a BUNDLE of rights which can be sold by the artist

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WE LOBBY AND GET LAWS PASSED.

The Guild authored the Copyright Justice Act, which seeks to reform the work for hire provision of the 1978 Copyright Law. the legislation is pending in the U.S. Congress. The national organization is also the leader of a coalition coalition that includes writers, photographers, performing artists and visual artists who have joined the effort for work for hire reform.

Other lobbying projects include moral rights which protect an artist's original work from alteration, mistreatment or damage, even after reproduction rights are sold, fair practices which clean up the ambiguity of ownership of the original work, fair equity to insure that artists can claim full market value deductions for works donated to charitable institutions, and creative rights in light of the developments in new technologies.

Bills on moral rights and fair practices have been passed in New York, Massachusetts, Oregon and California.

GRIEVANCES

Grievance procedures to resolve contract and payment disputes are available in most chapters. A legal referral system has also been established.

YOU GOT PROBLEMS? WE GOT PROBLEMS!

The Guild monitors problems that occur throughout the industry and logs in member complaints on issues concerning standard practices and pricing. The Guild will intervene on members' behalf in disputes with clients to secure fair and timely payment. Contract disputes, unfair terms, return of original work, etc.

NATIONAL BOARD & OFFICERS

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Secretary & Chair ...
Assistant Treasurer ...
Legal Counsel ...

The National Board of Directors, which has overall responsibility for the organization, is composed of elected members from each chapter. Each chapter has representation on the Board based on the number of members it has. The Board meets twice a year to approve the organization's budget, review the work of the past fiscal year and plan for the next. Meetings are held in New York City.

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CONTRACTS

Model contracts and confirmation forms are available free to members on request.

PUBLICATIONS

The Guild's compendium of prices and practices, The GAG Handbook: Pricing and Ethical Guidelines comes free with your membership. You also get national and chapter newsletters to keep you informed on industry developments and respond to an

IT'S EASY TO JOIN THE GUILD!

O.K., O.K., WHERE DO I SIGN?

HOTLINES

Artist to artist hotlines help members deal with questions concerning negotiation, pricing, contracts and other problems that frequently arise.

ILLUSTRATIONS: KIRK BARR ZAK

SPECIAL EDITION

separately is one which these companies are usually unfamiliar. There are some situations when the client will be presented with a work-for-hire agreement which, for a nominal fee, will allow [illegible] all of their [illegible] rights as described by Copyright Law. When negotiating on any assignment, [illegible] a work-for-hire agreement as an issue because it undermines the [illegible] of an artist's professional identity.

Ed Dimitri Cline, Illustrator/ Photographer

For the past nine years I have had my own business and it has been [illegible] I've also [illegible] the New Orleans Museum of Art, and I [illegible] commercial photography and [illegible] different [illegible] still [illegible] of work for hire.

Life magazine has a photographer's [illegible] material [illegible] clients [illegible] they just force it without paying me. Some [illegible] magazine, the size of Life, [illegible] a substantial amount, depending on the size of the [illegible] client. They say it belongs to them and that they have every right to reuse it or [illegible] they like because it was a work-for-hire. Finally, I [illegible] such as [illegible] with them. If I had, I would. I love [illegible] for me.

I really do work-for-hire. I generally refuse [illegible].

I don't believe in creating an image for a [illegible] client [illegible] I don't want [illegible] my photos dying in some [illegible] I destroy them.

In the case of years ago, I remain [illegible] commercial [illegible] me as the [illegible] and [illegible] some of my photography. Everything was [illegible] me, [illegible] one for me, without a written release, the [illegible] me the [illegible] were there. They asked me the [illegible] I said, "Yes." They [illegible] expert [illegible] They [illegible] it. I refused to [illegible] though we had already [illegible] and they [illegible] finally [illegible] I told them to forget it. They [illegible] going to get those pictures. They went back to their lawyers. The [illegible] said, "Well, the [illegible] [illegible] the [illegible] [illegible] [illegible] for them to [illegible] one of the [illegible] [illegible] [illegible]

GRAPHIC ARTISTS GUILD
11 WEST 20TH STREET/8TH FLOOR/NEW YORK, N.Y. 10011/(212) 463-7730

October 3, 1989

The Honorable Dennis DeConcini,
Chairman,
Subcommittee on Patents, Copyrights, and Trademarks
U.S. Senate Committee on the Judiciary
224 Senate Dirksen Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for providing the opportunity for the Graphic Artists Guild and its representative Don Martin to testify before your subcommittee on the "works made for hire" issue last September 20. We were honored to participate in this important forum.

The members of the Guild were encouraged by the close attention paid by you and Sen. Hatch to the statements of the creator's panel. We urge you to consider Sen. Hatch's suggestion to schedule additional hearings on work-for-hire abuses, and we look forward to offering testimony for the record at that time.

Enclosed is an additional statement to supplement our testimony at the September 20 hearing.

Thank you again for your consideration.

Sincerely,

Paul Basista

Paul Basista
Executive Director

Statement Regarding

S. 1253, A Bill To Amend The Copyright Law
Regarding Work Made For Hire

Before the

Subcommittee on Patents, Copyrights and Trademarks

Submitted by

Paul Basista,
Executive Director,

Graphic Artists Guild, Inc.
11 West 20th Street, 8th Floor
New York, NY 10011-3704
(212) 463-7730

Mr. Chairman and Members of the Subcommittee, the Graphic Artists Guild strongly supports S. 1253, a bill to amend the copyright law regarding work made for hire. Chronic and consistent abuses of the "work made for hire" provisions of copyright law have seriously disturbed the equilibrium between creators and distributors of copyrightable works which Congress intended to achieve in the Copyright Act of 1976.

The Graphic Artists Guild, which has supported efforts to correct work-for-hire imbalances through the last three sessions of Congress, is a national advocacy organization representing professional illustrators, graphic designers, computer artists and other creators. Their work is regularly reproduced in books, magazines, advertisements, newspapers, brochures, letterheads, record covers, cereal boxes, linens, table cloths and almost anything else that visually communicates ideas. Indeed, without their creative efforts, virtually every visual aspect of our man made environment would be blank. The breadth and value of their contributions, especially to the information, media, and entertainment industries are incalculable.

The copyright laws are designed to stimulate the production of creative works by recognizing from the outset that freelance creators are the authors of a work.[1] When properly operative, the interests of creators, distributors and the public are served. The only exception to

[1] U.S. Constitution, Art. 1, Section 8, Subsection 8 states:

> To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

the concept that creators are the true authors of their work is "work made for hire," which transfers authorship and all copyright rights to the commissioning party[2]. A stumbling block (imposed by Congress) to the free flow of ideas, work for hire is a disincentive for independent creators to create.

The right to continuing payment for continuing use is a fundamental right recognized throughout the information industries. Actors, directors, screenwriters, composers, radio performers, jingle writers, recording artists and others enjoy the fruits of their labors on a continuing basis, they are all rewarded for their work the more often it is used. Yet freelance creators forced to accept work for hire are deprived of this basic right.

Our opponents on this issue would have you believe that their very survival as purveyors of copyrightable material depends upon securing work-for-hire agreements. This is patently untrue. The truth is they desire work for hire merely because it simplifies their business administration; they wish to avoid paying creators for the additional uses of their work. This is meager justification for allowing the continuation of extortive abuses that dominate the market.

Current practices with respect to work for hire are so skewed against creators that immediate Congressional action is needed to achieve the balance intended by the 1976 Copyright Act. Among these abuses are work-for-hire agreements presented after substantial time, effort

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[2] 17 U.S.C. Section 101 (definition of work made for hire), referred to here as work for hire.

and expense have been invested in a job; work-for-hire language presented on the back of checks for work completed; blanket work-for-hire agreements which affect all future (and as yet unspecified) works; and when independent creators are arbitrarily and capriciously considered employees only for copyright purposes in the absence of any written agreement. Sen. Thad Cochran's introduction of S. 1253 (The Artist's Bill of Rights), is an important first step towards that end, although much more needs to be done.

S. 1253 WILL CLARIFY THE ORIGINAL INTENT OF CONGRESS

Sen. Cochran's "Artists Bill of Rights" does not propose to rewrite the law, it will merely clarify specific provisions of the Copyright Act of 1976 (known as "The Creator's Act), and restore it to what Congress originally intended.

S. 1253 Will Clarify the Meaning of Employee

In the 1976 Copyright Act, Congress intended to confine work for hire to two situations. First, to formal, salaried employees who, in exchange for a steady income and the basic protections afforded even the most unskilled workers, produce works for their employers. And second, to independent freelancers commissioned to execute a work only

if an agreement was signed by both parties that the work was to be "for hire." and if the work fell within nine specific categories.[3]

Although these intentions were presumed by all parties involved with the drafting and passage of the 1976 Act, some courts misinterpreted "employee" to mean anyone who could be supervised and controlled by a commissioning party.[4] A broad application of this misinterpretation could have affected virtually every freelance creator who executed an assignment, making the section regarding commissioned works meaningless. Conflicting decisions in other circuits[5] resulted in the U. S. Supreme Court's decision in CCNV v. Reid,[6] which resolved the definition of employee by applying the Common Law of Agency factors.

The Supreme Court's decision was an important step towards stemming flagrant abuses of the law. It did not however, reflect the

---

[3] Copyright Act of 1976, Section 101 limits works made for hire to:

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

[4] Aldon Accessories, Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir.), cert. denied, 469 U.S. 982 (1984).

[5] Easter Seal Society v. Playboy Enterprises, 815 F.2d 323 (5th Cir. 1987), cert. denied, 108 S.Ct. 1280 (1988); Dumas v. Gommerman, 865 F.2d 1093 (9th Cir. 1989).

[6] Community for Creative Nonviolence v. Reid, 109 S. Ct. 2166 (1989).

implicit understanding of the 1976 Act, which intended "employee" to mean formal, salaried employee. Furthermore, relying upon Agency Law factors will still leave it to the courts to determine an individual's status on a case by case basis; an open invitation for overwhelmingly economically superior entities to obtain property rights through litigation which it refused to attempt to obtain through negotiation.

S. 1253 will explicitly define employee to mean formal salaried employee, affirming the implicit intention of Congress to separate employees who produce works in the course of their employment, and independent creators who are commissioned to execute specific works. For the latter, the work must fall within the specified categories, and an agreement must be signed by both parties stating the work is for hire.

S. 1253 Will Clarify That Work-For-Hire Contracts Must Be Signed Before Work Begins.

Signing a contract prior to the start of work is sound business practice adhered to in virtually every aspect of our economy. The fact that Sen. Cochran has found it necessary to propose clarifying language reveals the pervasive abuses occurring with ever greater frequency.

Mr. Chairman, cartoonist Don Martin testified before you about his personal experience with checks containing work-for-hire language printed above the endorsement line of his check. What makes his experiences especially egregious is that the cartoons and gags he submitted were, for the most part, self-initiated and not commissioned by the publisher. But, as his testimony reflected, he had no choice but to accept the demanded terms.

The consequences for refusing to submit to these kinds of abusive terms can be catastrophic. Rick J. Bryant, an illustrator with fifteen years experience, was blacklisted for refusing to accept work-for-hire on the back of the check. The following is the full text of his statement:

> A number of years back, when I was working for number of companies, one being Marvel, an incident occurred at Marvel.
>
> For a number of years I had been working on and off getting paid by check. Not once sine (sic) I'd been working for Marvel was I offered a contract for a job. To my surprise, one day a check for an inking job had a stamped contract on the back of it. The only way to collect the money for the job done was to sign the back of the check thus signing the contract. Having spoken to the Graphic Artists Guild and other professionals I was advised that the contract was illegal, unethical and unenforceable. So I would cash the check by signing it and crossing out the contract. This went on for 2-3 years without any repercussions.
>
> The situation came to a head when I needed cash on the same day I received my check and had to go upstairs to one of the officers (I believe Jim Galton). He saw the crossed out contract and demanded an explanation. Upon explaining mine and the Graphic Artists Guild's viewpoint that it illegal, unethical and unenforceable, he replied that he had a whole floor of lawyers who said it was and how dare I cross it out. We got into an exchange of words and he told me he would see to it that I would never work at Marvel again.
>
> I left and cashed my check. Upon arriving home I received a phone call from an acquaintance on staff at Marvel and was informed my name came up at a meeting where editors were told not to hire me anymore.
>
> I spoke to Jim Shooter at Marvel and told him I would sign a contract but not on the back of a check but he ignored me and said he stood by Marvel's lawyers.
>
> Since then I have almost no work from Marvel. What work I did receive I was treated badly and ill paid for. I am paid beginners wages if I get any work even though I am highly regarded in the field."[7]

---

[7] Statement of Rick J. Bryant, dated July 19, 1989.

Creators, who have little bargaining leverage against the huge conglomerates which commission them, have even less after they've invested time, materials and expenses. To resist requires litigation to either enjoin the commissioning party from unauthorized use of the work; or to recover compensatory damages. Considering the high costs of pursuing a claim, independent creators with limited resources cannot pursue either course, while those who commission them can certainly withstand any action.

Clearly, Congress never intended for these abuses to occur, and could never have predicted their perniciousness. S. 1253 will clarify that work-for-agreements should be offered in advance, so the creator can choose whether or not to accept work-for-hire terms before work has begun.

S. 1253 Will Clarify That Work-For-Hire Contracts Were Not Intended To Cover Multiple Works.

Congress also never intended for a single work-for-hire agreement to apply to all future work executed by a freelance creator for a distributor. "Blanket" work-for-hire contracts which are presented to apply to any and all work that will ever be done for a client have proliferated, depriving creators of the opportunity to negotiate the terms for each project offered.

In the advertising industry, "blanket" work-for-hire contracts are now common. For example, Arnell/Bickford Associates, Ltd., a New York advertising agency reacting to the CCNV v. Reid decision, recently distributed an "Artists Release" to all the freelance creators with whom

it has ever contracted, whether they were working on an assignment or not. Not only does it attempt to capture all future work as work for hire, but it appears to be attempting to capture work previously done as work for hire. It states in part:

> For valuable consideration receipt whereof is hereby acknowledged, the undersigned hereby gives, grants and transfers to Arnell Bickford Associates, Limited ("Arnell") the irrevocable right and permission to copyright, in its own name or any other name, any and all work, work product or material created or produced by me while acting as a freelance artist or independent consultant for Arnell (emphasis added).[8]

Book publisher Ottenheimer Publishers, Inc., of Baltimore, Maryland, uses similar language:

> This letter, when countersigned by you, shall confirm the pre-existing agreement between us whereby you agreed to work as our "employee for hire" to perform services in connection with the preparation of material for various books created, published, distributed and/or licensed by us and will constitute our mutual agreement to continue such relationship until either of us shall elect to terminate this agreement by written notice to the other signed by the party electing to terminate.
>
> You have performed and shall continue to perform such services pursuant to our direction and in accordance with instructions given to you by us. All phases of your work product shall be subject to our control and we shall have the right to make changes or modifications in your work product at our sole and exclusive discretion. We shall be under no obligation to use any of your work product in the final version of the book. The work performed by you pursuant to this agreement shall be considered a work made for hire and we shall own all rights in and to the work...
>
> In consideration of One Dollar ($1.00) and other good and valuable consideration, you hereby acknowledge and agree that the work produced in accordance with this agreement and all future rights pertaining hereto are entirely our property forever as employers of a work made for hire, including, without limitation, any and all copyright terms and extensions and renewals thereof.

---

[8] Artists Release, Arnell/Bickford Associates, attached.

But in addition to depriving the freelancer of any and all rights to any and all works that might ever be produced, the publisher also demands the right to exploit the freelancer's name and likeness for the promotion of the book:

> Credit may be given for the work performed by you in accordance with this agreement at our sole discretion and we may use you name, likeness and biography in any and all promotional material or advertising for books or any other work which embodies your work products.[9]

Publishers contend that multiple work agreements are designed to provide the commissioning party with a set number of works over a prescribed period of time. This is patently untrue. Nor are "blanket" agreements limited only to those commissioners which claim the need to meet the constraints of "fast breaking" stories. These abuses are not limited to the news or broadcast media. They are in widespread use by book publishers, advertisers, beer breweries, computer companies and others, none of which are constrained by tight deadlines. and all of which are motivated by the glaring loophole in current law.

S. 1253 will provide the explicit language that was implicitly intended; that work-for-hire can occur "if, with respect to each such work, the parties expressly agree in a written instrument signed by them before the commencement of the work, that the work shall be considered a work made for hire (emphasis added). This will finally put to rest the abuses suffered by "blanket" work-for-hire agreements.

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[9] Letter of Agreement between illustrator Sally Mericle and Ottenheimer Publishers, Inc., attached.

S. 1253 Will Clarify The Issue of Joint Works

Mr. Chairman, the Graphic Artists Guild believes that the area of "joint works" will be the next area in which independent creators are abused by those who commission them. Failing to achieve work for hire, we anticipate that commissioners will now claim joint authorship after a work has been completed, once again achieving all rights for continued exploitation of a work without negotiating for them.

Joint authorship requires an accounting of the profits to the joint author, but we expect freelance creators will be forced to litigate in order to receive their accounting. Even more of a problem is that much of the work created will be used in ways where an accurate accounting will be virtually impossible, for example as advertising, for which profits cannot easily be calculated.

Furthermore, we expect commissioners to argue that furnishing the "idea" for a work will qualify them as the work's "authors." However, an idea by itself is not copyrightable; only the tangible expression of an idea can be copyrighted. Since commissioners cannot fix an idea in tangible form themselves, they choose an individual creator based on the creator's unique vision, style and level of expertise.

In 1987 the Graphic Artists Guild conducted an experiment which clearly demonstrated that freelance creators have a unique and individual vision which qualify them as authors of the work. A well-known work (Grant Wood's "American Gothic) was translated into a standard "purchase order" typically used by commissioners, and then

assigned ten different illustrators to execute the work. If the contention of the commissioners was correct, one would have expected the submission of ten perfect reproductions of the "American Gothic". The submitted works, however, were ten distinct and only remotely similar executions, proving that each artist has a distinct and unique vision, and that artists are unmistakably the true authors of their work, despite the directions provided by the commissioning party.[10]

Mr. Chairman, by clarifying contributions to a joint work to be "original" (meaning tangible and copyrightable), and by clarifying that a joint work agreement must be signed by the parties before the commencement of work (rather than after the work has begun or been completed), S. 1253 anticipates and avoids the kinds of abuses that freelancers have experienced under work for hire.

Work For Hire Is A Wrongful Restriction On Trade

Work for hire is not a function of a free market. Rather, it is a disruption of the free market imposed by Congress. Enacting legislation requiring creators to forfeit authorship and all attendant copyrights is, in copyright terms, radical and unwarranted. This tinkering with the Constitutional intent to reward creative endeavor by depriving creators of authorship to their creations, has caused unfair and unnecessary hardships to independent creators, and has stifled the free flow of ideas.

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[10] The results of this experiment were published in the Fall 1987 Special Edition of the Graphic Artists Guild Newsletter, submitted into the record as an attachment to the Statement of Richard Weisgrau, Executive Director of the ASMP on behalf of the Copyright Justice Coalition.

Freelance Creators Are Independent Entrepreneurs

Artists embody the entrepreneurial spirit. They buck every societal trend to enter (and remain in) their chosen field. Driven by their need to actualize their inherent talents, they create works which benefit every segment of society.

Like their hiring counterparts, freelance creators are independent businesses. They pay rent, provide their own materials, supplies, insurance, and advertising. They invest substantially in equipment, pay taxes and assume all other costs of doing business. Like their hiring counterparts, they take risks with the hope of realizing financial rewards. The Constitutional right to continuing payment for continuing use of their creations is therefore essential to the freelance creator's business.

Because work for hire turns independent creators into employees for purposes of copyright, they lose the right to continued payment for continued use, prevented from fulfilling their entrepreneurial spirit. By permitting freelance creators to be considered employees for purposes of copyrights only, Congress deprived them of the opportunity to maximize profit from their works (a fundamental entrepreneurial right), and simultaneously denied them the right to the protections enjoyed by other classes of employees.

Formal, salaried employees can depend upon a regular income. Their employer pays for unemployment insurance, disability insurance, workers compensation insurance, and 7.51% of Social Security (FICA) taxes. They often receive other benefits like pensions, vacation pay,

sick pay, medical insurance and protection from tort liability. And perhaps most importantly, they are statutorily protected to engage in concerted activity and to bargain collectively in order to improve their conditions.

However, freelance creators who are forced to accept work-for-hire are (in most cases), independent contractors for all purposes other than copyright, and enjoy none of the benefits that even the most unskilled workers have available. They must pay their own FICA, and in many cases carry no disability insurance. Approximately 80% cannot even afford to carry medical insurance. There are no paid vacations or sick days and the only pension they might have been able to look forward to was their copyrights, which under work for hire, they no longer own. And, if they attempt to organize and bargain collectively with the entities that employ them, they may be subject to anti-trust action.

Our opponents claim that disturbing the status quo with respect to work for hire will harm freelance creators, claiming that unless they can secure work-for-hire agreements, they will be forced to hire staff artists to do the work. The first inaccurate assumption is that freelance creators do not want the security of a staff position. The second is that artists will be hired as formal, salaried employees.

Trends in the advertising, media, and publishing industries indicate that entire departments of creative talent are being dissolved, forcing formal, salaried employees to compete as freelancers. The same

work formerly done by staff creators are now contracted to freelancers. The New York Times reports:

> Since 1985, ad agencies have dismissed a steady stream of employees. In the last three years it is estimated that 4,000 to 5,000 ad executives in New York have lost their jobs, about one in six...In the ad business, 80 percent of overhead walks out the door every night, so the first cuts are usually of staff. When the industry was healthy, jobs were created when an agency won an account. Now, an agency is more likely to overtax employees or use freelancers during busy periods.[11]

Freelance creators are in greater demand today because buyers of creative services are unwilling or unable to pay all the costs and fringes associated with retaining employees. Yet, the same freelance creators are being contracted by their former employers on a work-for-hire basis, often at less pay than previously earned and with none of the benefits and protections. The truth is that most freelancers would forego the headaches of running a business in exchange for the opportunity to devote all of their time to creative efforts.

Furthermore, current trends towards the globalization of advertising, publishing, media and entertainment will restrict the free market forces controlling client-creator negotiations. As one major entity puts it:

> Every player in the media/entertainment business - at least every smart one - will be trying to build vertically integrated enterprises that can compete in the new reality of the global market. To master the scope of this challenge and to achieve the necessary economies of scale, companies will have to grow dramatically in size.[12]

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[11] Aimee L. Stern, Selling Yourself on Madison Avenue, The New York Times, October 1, 1989, page 4F.

[12] Time Inc. 1988 Annual Report, pg 4.

Globalization will make it even more difficult for freelance creators to market their works on equitable terms. As markets shrink to only a few powerful purchasers of creative works, any attempt to resist work-for-hire may pose dire consequences for the freelance creator.

Our opponents on this issue intend to keep the hundreds of thousands professional graphic artists as employees-at-will, without assuming even the minimal obligations or responsibilities required of employers. They should not be allowed to have it both ways: either a creator is an employee creating works for hire, eligible for benefits; or they are independent contractors who have the ability to maximize the profits from their creations.

Creative Works Have Tremendous Value

The strong opposition to any change in the work-for-hire status quo by publishers and other distributors underscores the vast fortunes at stake. Time Inc., for example, reports 1988 operating income to be $4.5 billion and the value of its total assets to be $4.9 billion[13]. Of those assets, $986 million are attributed to "Goodwill and Other Intangible Assets," and $467 million to "Programming and Other Intangible Assets."[14]

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[13] Time Inc. 1988 Annual Report, pg 1.

[14] Time Inc. 1988 Annual Report, pg 36. "Goodwill and Other Intangible Assets" consist of goodwill, cable television franchises and other intangible assets. (pg. 40).

A substantial portion of this wealth, valued in the billions, is generated by freelance artists, designers, writers and photographers. According to U.S. News & World Report, there are an estimated 929,000 commercial artists and designers in the United States, and "salaries for an artist or a designer start in the midteens and reach $40,000 after five to 10 years."[15] Yet the fruits of their labor contribute to a surplus of over $13 billion annually to the U.S. Trade balance.[16] In a real sense, those who insist on work for hire pick this wealth right out of the freelancers' pockets.

The pockets picked are not limited only to beginners who "need to pay their dues." Even veteran artists like Mort Walker (who has 40 years experience in the field), are confronted with work for hire:

> King Features sent me a renewal contract containing the work-for-hire provision although I had created "Beetle Bailey" many years previously. I refused to sign it, and held out a year with no contract till they sent me a proper one.[17]

Work-for-hire agreements are not needed by art buyers to operate their businesses, they demand work for hire because it is administratively simpler, and because they simply wish to pay the least amount for as many rights as can be obtained.

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[15] U.S. News & World Report, Sept. 25, 1989, page 64.

[16] Statement of Mike R. Klipper on behalf of the Committee For America's Copyright Community before the Subcommittee on Patents Copyrights and Trademarks, September 20, 1989, pg 4.

[17] Statement of Mort Walker, date June 23, 1989. [King Features, Inc. is a subsidiary of Hearst Publications Inc.].

Work For Hire Deprives The Creator
Of The Future Value Of A Work

Our opponents speciously claim that copyright ownership of an individual contribution to a combined work has little or no value standing alone. No one can accurately estimate the future value of a work. In 1953 for example, Topps, the preeminent company in bubble gum cards, commissioned freelance illustrators to paint that year's series of baseball cards. The artists, who were freelancers working out of their own studios,[18] were paid $25 as full and final payment for each image as a work made for hire.

After decades in storage (during which the public had no access to these works), Topps began selling a collection of 25,000 items on August 28, 1989. Six of the original 3 1/4-by-4 1/2 inch paintings were auctioned to the Marriot Corporation for display in the company's hotel sports bars throughout the country. The Mickey Mantle portrait was sold for $110,000. The Willie Mays portrait was sold for $80,000. The remaining four portraits of Jackie Robinson, Whitey Ford, Bob Feller and Roy Campanella were sold for $71,000, $32,000, $30,000 and $15,000 respectively. The auctioneer received a 10% premium of $33,800. The artists, who did not receive even a name credit, received nothing.[19]

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[18] Louis Carbone, The Design and Illustration of Baseball Cards and Their Influence on Contemporary American Illustration, unpublished Masters Thesis, Syracuse University, 1989. The 1953 series contained 280 cards and were painted by 5 different artists.

[19] Craig Wolff, Pieces of Sport Fantasy Fetch High Prices in the Real World, The New York Times, August 27, 1989, Section 1, Part 2, pg ___.

It is in the public interest to keep creators creating. Allowing creators to retain authorship to their works will allow greater access to works because the individual authors have greater motivation to exploit them. Too often a work made for hire is used only once and is then filed away or discarded, never to be seen again. It is not in the public's interest to deny access to these works.

The Public Loses With Work For Hire

Insistence on work for hire encourages substandard work. Individual creators rarely put the same effort or care into work they cannot own or exploit. Understandably, without pride of ownership, or even a name credit, the creator will do less than his or her best.

In educational textbook publishing, work for hire is a non-negotiable policy throughout the industry.[20] The most talented artists, writers and photographers therefore, will not work in that field. In view of the current concerns about revitalizing our educational system, we should ensure that students are exposed to the best work available.

Unfortunately, since the best talent will not work in that industry, the talent that is retained is less than best, and even they will not put their best efforts into a work-for-hire assignment. While government officials promise to spare no expense revitalizing our flagging educational system, textbook publishers which insist on work for hire deprive American students of America's best available work.

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[20] For another perspective on work-for-hire abuses in the educational publishing field, see the statement by Design Five, (attached).

Market Globalization Is Dangerous To The Public Interest

It is also not in the public interest to allow only a handful of "vertically integrated media giants"[21] to control all copyrightable material and the means to distribute it. The trend towards globalization of the market and the stated objectives of entities to achieve complete control and ownership of copyrightable materials is dangerous. Time Inc.'s stated purpose is clear:

> In the media and entertainment business of the future, the winners will own the copyrights to creative products, as well as avenues of distribution. We intend to increase our ownership of both.[22]

The public's free access to information depends upon a wide variety of choices and sources from which to choose. When information and the means to distribute it are owned and controlled by only a few, questions arise as to what might be deliberately withheld from public access. This unbalanced control of information not only raises serious questions about censorship, but also raises serious anti-trust questions. Time Inc., for example, clearly reveals its power:

> Every day millions of readers and viewers depend on us a...source of news, information and quality entertainment...In addition to satisfying consumer tastes, we've helped form and shape...those tastes.[23]

Restricting work for hire will broaden the base of copyright ownership, providing the public a wider choice. And freelance creators

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[21] Time Inc. 1988 Annual Report, Front Cover states: "By the mid-1990's the media and entertainment industry will consist of a handful of vertically integrated, worldwide giants. Time Inc. will be one of them..."

[22] Time Inc. 1988 Annual Report, pg 3.

[23] Time Inc. 1988 Annual Report, pg 6.

who retain authorship to their works will pursue their entrepreneurial spirit and exploit their works in creative and imaginative ways which are not economically feasible for global entities.

S. 1253 will level the playing field that Congress inadvertently skewed, and correct a previous disruption of the market, i.e., the formalization of work for hire. S. 1253 does not propose intervention into private negotiations. On the contrary, it will allow negotiations to occur freely. Restricting work for hire will help provide the economic incentives constitutionally guaranteed to creators to further creation. Congress must correct the unbalanced support it inadvertently conceded to buyers of works.

S. 1253 Is A Modest And Sensible Solution

Mr. Chairman, S. 1253 is a sensible approach towards achieving what Congress intended with the Copyright Act of 1976. It does not rewrite the law, but it will successfully clarify existing provisions to stem and correct damaging misinterpretations. It is a modest measure which deserves your full support, and the Graphic Artists Guild urges you to do so.

But the enactment of S. 1253, although an important step towards balancing the rights of creators with the needs of investors, will not achieve the equilibrium desired or intended by Congress. S. 1253 does not propose anything new, it will only bring us back to where Congress intended us to be in 1976, back to square one.

It is the responsibility of Congress to ensure the public's access to creative work. That is precisely the delicate balance that Congress intended in the 1976 Copyright Act. The work-for-hire abuses which continue to proliferate clearly indicate the public interest has not been served.

The Constitution intended to give creators an edge to encourage creations. Congress, therefore, has a responsibility to address the inequities of the market.

# # #

ATTACHMENTS

A number of years back, when I was working for a number of companies, one being Marvel, an incident occurred at Marvel.

For a number of years I had been working on and off getting paid by check. Not once sine I'd been working for Marvel was I offered a contract for a job. To my surprise, one day a check for an inking job had a stamped contract on the back of it. The only way to collect the money for the job done was to sign the back of the check thus signing the contract. Having spoken to the Graphic Artists Guild and other professionals I was advised that the contract was illegal, unethical and unenforceable. So I would cash the check by signing it and crossing out the contract. This went on for 2-3 years without any repercussions.

The situation came to a head when I needed to cash on the same day I received my check and had to go upstairs to one of the officers (I believe Jim Galton). He saw the crossed out contract and demanded an explanation. Upon explaining mine and the Graphic Artists Guild's viewpoint that it illegal, unethical and unenforceable, he replied that he had a whole floor of lawyers who said it was and how dare I cross it out. We got into an exchange of words and he told me he would see to it that I would never work at Marvel again.

I left and cashed my check. Upon arriving home I received a phone call from an acquaintance on staff at Marvel and was informed my name came up at a meeting where editors were told not to hire me anymore.

I spoke to Jim Shooter at Marvel and told him I would sign a contract but not on the back of a check but he ignored me and said he stood by Marvel's lawyers.

Since then I have had almost no work from Marvel. What work I did receive I was treated badly and ill paid for. I am paid beginners wages if I get any work even though I am highly regarded in the field.

OTTENHEIMER PUBLISHERS INC
Established 1890
300 Reisterstown Road
Baltimore, Maryland 21208
(301) 484-2100 • FAX (301) 486-8301
Cable: Ottpub • Telex 198110

February 6, 1989
Sally D. Mericle
6214 Woodcrest Avenue
Baltimore, MD 21209

Dear Sally:

This letter, when countersigned by you, shall confirm the pre-existing agreement between us whereby you agreed to work as our "employee for hire" to perform services in connection with the preparation of material for various books created, published, distributed and/or licensed by us and will constitute our mutual agreement to continue such relationship until either of us shall elect to terminate this agreement by written notice to the other signed by the party electing to terminate.

You have performed and shall continue to perform such services pursuant to our direction and in accordance with instructions given to you by us. All phases of your work product shall be subject to our control and we shall have the right to make changes or modifications in your work product at our sole and exclusive discretion. We shall be under no obligation to use any of your work product in the final version of the book. The work performed by you pursuant to this agreement shall be considered a work made for hire and we shall own all rights in and to the work, including the right to use the same in any and all versions of our book.

We agree to pay you as full compensation for your services a one-time fee in amount to be agreed between us with respect to each project.

In consideration of One Dollar ($1.00) and other good and valuable consideration, you hereby acknowledge and agree that the work produced in accordance with this agreement and all future rights pertaining thereto are entirely our property forever as employers of a work made for hire, including, without limitation, any and all copyright terms and extensions and renewals thereof.

Credit may be given for the work performed by you in accordance with this agreement at our sole and absolute discretion [redacted]

RECEIVED
MAR 23 1989

the portion deleted reads:
"and we may use your name, likeness and biography in any and all promotional material or advertising for books or any other work which embodies your work product."
they not only want to own your work - they want to own YOU!

page 2

You warrant and represent that the work performed by you hereunder is and will be your own work product, that such work will not violate or infringe any copyright, trademark, right of privacy or publicity or other proprietary right to any person nor constitute libelous, obscene or unlawful matter and you agree to indemnify us against any and all loss, expense or damage arising out of any claim, demand, suit, action or proceeding alleging a violation of said warranties and representations, including without limitation reasonable attorneys' fees.

You agree to execute any additional documents or instruments necessary or desirable to carry out the purposes of this agreement including any formal assignments of the rights granted to us herein.

Very truly yours,
OTTENHEIMER PUBLISHERS, INC.

Emeline Krois
Corporate Secretary

AGREED TO AND ACCEPTED:

Sally Mericle

Date 5-8-84

SS# 583-48-1166

sally mericle
ILLUSTRATION + GRAPHIC DESIGN
GRAPHIC ARTISTS GUILD MEMBER
(301) 358-1985
6214 WOODCREST AVE. BALTIMORE, MD. 21209

Arnell/Bickford Associates 100 Grand Street New York New York 10013 212.219 9480

ARTISTS RELEASE

For valuable consideration receipt whereof is hereby acknowledged, the undersigned hereby gives, grants and transfers to Arnell Bickford Associates Limited ("Arnell) the irrevocable right and permission to copyright, in its own name or any other name, any and all work, work product or material created or produced by me while acting as a freelance artist or independent consultant for Arnell.

I further grant to Arnell the irrevocable right and permission with respect to such work, work product or material to use, reuse, publish and republish same, from time to time, for whatever purpose and without restriction as to changes or alterations individually or in conjunction with other works and material in any medium and for any purpose whatsoever, including but not by way of limitation, illustration, promotion, advertising and trade.

I further grant to Arnell the irrevocable right and permission to obtain, retain and utilize the benefits of any copyright available for the work, work product or material so produced or created by me. I hereby release and relinquish any and all right, title or interest in and to such work, work product or material. Arnell shall further have the right, at any time, and in their sole discretion, to copyright said work, work product or material created by me in its own name and to reprint and reuse the said work, work product or any material pertaining thereto without any further permission from me, and without any further compensation due me.

I hereby release and discharge Arnell from any and all claims and demands arising out of or in connection with the use of said work, work product or material, including any claims pertaining to copyright infringement or violation of any proprietary right. This authorization and release shall inure to the benefit of Arnell, its legal representatives, licensees and assigns and is hereby declared to be irrevocable.

The undersigned is over the age of twenty one (21), has read this Release and fully understands the intent thereof and its contents.

IN WITNESS WHEREOF, the undersigned hereby executes this agreement on the _____ day of _____, 19____

_____
signature

Accepted:
Arnell/Bickford Associates, Ltd. by _____

Fax 212.334 0175

DE5IGN

JUL 13 1989

Design Five 2657 Broadway New York N.Y. 10025 (212) 222-8133 Fax (212) 866-6182

July 10, 1989

Graphic Artists Guild
11 West 20th Street
New York, N.Y. 10011

Re: Work-For-Hire

This an addendum to the survey and serves as a summary of our experiences. It is hard to supply back-up regarding all agreements, as our records are in a disarray at this moment, I hope this will help despite the lack of paperwork/back up.

Design Five's clientele consists primarily of Educational Publishers . The way they work is they will hire between 2-4 design studios to present initial designs, which are often quite extensive and expensive to produce, often under quick deadlines. It is our experience that all of these Publishers are "Work for Hire" contracts. The publisher rarely has told us that at the onset, it is usually after we have after we have begun work, submitted our first bills and are then asked to sign a Purchase Order/Contract. These contracts need to be signed before any payment is made, and whether or not our design studios presentation is the accepted and final design. To summarize, our work is their property whether or not it is actually produced or not. If our work is accepted as it was with a Math presentation for Addison Wesley, they will hire another design studio to apply our design to the final product as well as to produce the entire series (using our initial design concept). It is well known in our field that doing presentations usually is a loss to the studio, and we are never totally compensated. It is to the Design Studio's best interest to, upon acceptance of the final design, actually be commissioned to do the art buying, mechanicals etc. That is the area that is profitable.

In addition, our design work (for a reading series) was applied to all the publisher's promotional and ancillary products, the publisher used our designs (as well as illustrations that we commissioned in the intial series) without our knowledge or approval.

In general we have lost alot of income from the "work for hire" contract.

Please call me if you have any questions.

Sincerely,

Emily Ruth Cohen
Studio Manager

STATEMENT OF THE AUTHORS GUILD
IN SUPPORT OF S.1253

A Bill to Amend the Copyright Law
Regarding Work Made for Hire

Before the Senate Subcommittee on
Patents, Copyrights, and Trademarks

September 20, 1989

September 20, 1989

Subcommittee on Patents, Trademarks and Copyrights
Committee on the Judiciary, United States Senate

Statement of The Authors Guild, Inc. on S. 1253

Works Made For Hire

The Authors Guild is the national organization of 6500 U.S. book authors and magazine writers. Together with The Dramatists Guild we are The Authors League of America, Inc. We were founded in 1912 with President Theodore Roosevelt as our first vice president, soon after he left the White House. Our original mission was to establish in the Law the principle of divisibility of copyright. This took decades to accomplish and meant that we have been in Washington representing authors on copyright issues for nearly eight decades.

We are here today to ask that the Subcommittee support Senator Cochran's amendment to the Copyright Law (S. 1253). The work made for hire condition is an exception to the fundamental premise of the 1976 Act that the creator of a work owns his own creation and therefore owns the copyright in that creation. We authors have a unique perspective on the work made for hire issue which is before the Subcommittee today. We were instrumental in the 1950s and 1960s in reaching the compromise that allowed any categories of works made for hire. We understood that there were some instances where the work made for hire condition was practical. One was for bona fide employees. There were also some kinds of works such as indexes,

translations, etc., where we agreed the work made for hire condition might be a practical necessity. Screenplays were also included in the compromise. Today there are nine categories of such works that are recognized by the Copyright Law as long as there was a signed written agreement.

We did not expect then that the kinds of abuses of the work made for hire provision which have persisted over the last ten years would have occurred.

We are not today asking to modify our compromise. We are merely asking for a clarification of the rules that govern works made for hire so that reality will conform with the intentions of the Congress in enacting the 1976 Copyright Law and the spirit of the works made for hire compromise that we struck many years ago.

The recent 9-0 Supreme Court decision in CCNV v. Reid was an important step in this direction, but it is only the first step. The decision begins to redress the abuses that often occurred when copyright purchasers claimed they had bought a work made for hire by arbitrarily defining the creator as an employee. For all purposes other than copyright -- in the Tax Code and in antitrust and labor relations areas -- the creator was conveniently defined as an independent contractor. Thus, through their superior bargaining position, purchasers enjoyed the double benefit of claiming a creator as an employee where it would be advantageous and disavowing the employment relationship where it would be disadvantageous. The creator lived in a world where he suffered all of the disadvantages of a freelancer as well as the disadvantages of employment, without any of its benefits.

We believe, however, that the principles of the Court's ruling must also be clarified legislatively so that independent creators -- most of whom do not have ready access to copyright and contract lawyers for both geographic and financial reasons -- will not have to resort to the courts on a case by case basis in order to enforce their rights.

We further believe that the three additional provisions in S. 1253 are important in clarifying the rules that govern works made for hire. The requirement that all work made for hire agreements must be signed before work begins, the prohibition of blanket or "lifelong" work for hire agreements covering all works into the future, and the requirement that all joint work copyright ownership must be agreed to in writing before work commences simply clarify procedures. There can be no fair-minded publisher or commissioner of creative works who could possibly object to making an agreement in the light of day with all facts on the table for both parties.

In the freelance world, it is common for creators to begin work and incur expenses before contracts are signed. To be forced to sign an ex poste work made for hire agreement as a condition for payment is patently unfair. But many independent creators have had to suffer that indignity in order to recover their costs. Blanket work made for hire agreements are no different from indentured servitude.

Mr. Chairman, we authors are not here to ask the Congress to abolish the ability of publishers and other marketers of creative works to commmission works made for hire, although one might believe otherwise listening to the outcry of those opposing Senator Cochran's bill.

We are here because we believe it is essential to incorporate in the Copyright Law a clear meaning of the term "employee," to clarify the intention of Congress in enacting the work made for hire section of the 1976 statute and to restore the spirit of the compromise reached between authors and publishers so many years ago.

We are not here because things have been going smoothly over the past decade. We believe passage of S. 1253 is necessary to insure a level playing field so that the interchange between creators and the purchasers of creative works will be a free market.

Helen A. Stephenson
Executive Director
The Authors Guild, Inc.

NATIONAL WRITERS UNION

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Milton Viorst
Betsy Wade

Kim Fellner
Executive Director

TESTIMONY ON S. 1253
RE: WORK MADE FOR HIRE

Before the Subcommittee on
Patents, Copyrights and Trademarks

Presented by Alec Dubro
President, National Writers Union

The National Writers Union is a member of
the Copyright Justice Coalition

Boston • Chicago • D.C. • Los Angeles • Minneapolis/St. Paul • New Jersey
• New York • North Carolina • San Francisco • Santa Cruz/Monterey • Westchester

Mr. Chairman,

My name is Alec Dubro and I have been a professional writer for 18 years. I have written magazine and newspaper stories, radio and television copy, edited books and magazines, and recently published my own book on organized crime. I am an associate of the Center for Investigative Reporting and I am the President of the National Writers Union.

I believe that work for hire is a threat to the economic survival of American writers. It affects me personally. Its spread would harm me further.

Let me give you an example. In 1978, I was contracted by a California nonprofit organization to write a publicity manual for community groups. I accepted a low fee because it was a worthy cause and because they could not afford more. Later, the files were acquired by another organization which reprinted and distributed the booklet, and which later passed it on to other organizations which also reprinted and distributed it. It is the most widely used such book in California. On one version my name was misspelled. I never received more money, although one group offered me a free membership. Because it was a work-for-hire contract, I had no recourse. I cite this example not because the individuals involved were evil or profiteering, but because acceptance of this practice is unfair and demoralizing to writers no matter who employs it.

The spread of work for hire undermines the system by which I support my work. Ownership of my work has made it possible for me to undertake financially unprofitable projects. Several years ago, for instance, I conducted a lengthy investigation and wrote an article for a political magazine for $1200. This article, on the uses of surveillance, took a great deal of time, and I calculated that I had worked for less than $3 an hour. Because I owned the work, however, I was able to resell versions of the article to daily newspapers; this nearly doubled my take. This infusion of money came at a critical time and allowed me to take the time to finish my book.

Ownership of work in this case, and many other cases, means that writers can often work in areas which cannot be adequately funded, but which contribute to the political or cultural diversity of the written word. Author ownership, too, does not only aid the author and the public. It is also a boon to economically marginal publishers or publications -- those enterprises which use the work of less commercial or beginning writers -- who can share financial risks with the author.

It is not simply a matter of money, though. I am proud to own a collection of my own work. And, this ownership enables me to go back and rework earlier articles because I received new information or simply because I have had the time to think about it further. If all my work were work for hire, I don't think I would care much about the subject once the fee were paid.

What most writers strive for is the ability to pursue projects on the basis of merit and long term success rather than immediate gain. The ability to earn royalties from a body of work is what enables writers, particularly veteran writers, to take the time to think, to research, to write and rewrite. This is what guarantees breadth and depth of literature and reportage. The existence of independent writers guarantees a diversity of thought, and diversity supports all thought. Scientists have recently discovered to their alarm that the shrinking gene pool of the world's plant and animal species is a threat to the survival of us all. Likewise, reducing the financial base of independent writers will eliminate many such writers and narrow the nation's intellectual and cultural focus.

I have chosen to be a freelance writer not because the field guaranteed me economic gain or security, but in spite of hardships. I did, nonetheless, expect that the players would adhere to certain rules. Work for hire is contrary to the rules, to tradition, and is simply robbery. It is ironic too that for years publishers have been crying about similar theft conducted by countries like Taiwan and the Soviet Union which have ignored accepted copyright agreements. The publishers in their cases have cited many of the same abuses that I am citing here, but they refuse to note that authors, too, have the right of ownership.

We are not being offered financial security in exchange for our ownership or rights. We are simply being denied rights. And one of the hidden rights is hope. Hope that we can achieve success through money, through fame, through the spread of ideas. Hope that eventually we will not have to choose to work on the basis of economic expediency, but rather on other, more substantial, grounds. That we can gain what creative artists want and need: time and freedom to create in accordance with our vision.

In the past two years more and more major magazines have sent out work for hire contracts which I continue to refuse to sign.

Please help us stop the use of this insidious loophole and return to us the ownership of our work.

NATIONAL WRITERS UNION

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New York, New York 10003
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Kim Fellner
Executive Director

ADDITIONAL COMMENTS ON WORK FOR HIRE
EXAMPLES OF WORK MADE FOR HIRE CONTRACTS

Submitted by the National Writers Union
as part of the Copyright Justice Coalition Testimony
before the Subcommittee on Patents, Copyrights and Trademarks

The National Writers Union, representing almost 3,000 book authors, journalists, poets and practical writers, is deeply concerned about the impact of work for hire on the earning capacities of our members.

Writers, like other groups of artists, are victims of two contradictory myths. The first is that most writers are highly paid for their work; the second is that writers enjoy being impoverished — what we term the "starving artist in garret" myth.

Neither is true. The average income of our members hovers at $15-20,000, with many subsisting at or near the poverty line. And we have yet to meet a writer who sings the praises of starvation.

The copyright laws were established to ensure that creators retained some control over the disposition of their work and were at least partial beneficiaries of the economic rewards of their own labors. Creators were intended to own their copyrights; they could then contractually lease specific rights to publishers and employers in return for appropriate remuneration.

Work for hire vitiates this intent. It pressures authors to sign away all their rights without enough information to demand a fair market value for their work.

Let us say that an author writes a magazine article, for which he or she receives the princely sum of 30 cents per word (not uncommon). A substantial 2,500 word article (10 double spaced typewritten pages, requiring research) would thus earn the author $750. That isn't much even for a single use in a magazine. However, let us now assume that the publisher reuses the article — prints it in the other publications he owns; sells it to other publishers; uses it in an anthology of articles; and, with increasing frequency, sells it to various computer syndicates.

Suddenly, the publisher is making money off the creator's work without passing on any of the profits. Not only is the author or artist out the additional compensation, but he or she also loses the opportunity to rework and resell the material; the additional exposure has crippled the creator's capacity to survive in the marketplace.

A troubling by-product of these economic dynamics is that it becomes increasingly difficult for the author to invest time in thorough research or distinguished literary endeavor. If the publisher, as a condition of use, demands all rights to the work, the writer can no longer afford the painstaking effort required for investigative reporting and creative innovation — unless the initial fee is large enough to compensate all future uses — which is seldom the case. The reduction of independent creative work is a loss to the lively exchange of ideas we cherish in a democratic society.

These destructive aspects of work for hire have all been exacerbated by the increasing consolidation of the media industry.

Ten years ago, National Writers Union member Ben Bagdikian, author of The Media Monopoly, wrote that 50 firms controlled more than half of all U.S. media. Today, it's 26 firms. And in a decade, says Bagdikian, five or ten will control the world's information flow. Those who are gaining from this process are out to get all they can.

We know it because they say so. According to Time, Inc.'s 1989 Annual Report: "By the mid-1990's, the media and entertainment industries will consist of a handful of vertically integrated worldwide giants. Time, Inc. will be one of them."

Several months after this report, Time made good on its threat. It merged with Warner Communications to become the largest private media company in the world, worth nearly $20 billion. But behind them are a host of others, some whose names may not yet be familiar. Outfits like Murdoch, International Thomson, Hachette and Reed International.

The media barons are not indulging in this concentration and homogenization out of a hatred of culture, or even a hatred of writers, although some would argue that point when Murdoch is discussed. They are doing it to streamline, to cut costs, in short, to increase profits. And since the owners don't actually produce anything, they must, in order to increase profits, charge more and pay less. By limiting the number of players, as they have in U.S. magazine distribution where there are now only five national firms, all owned by familiar names, they can charge more. But where they want to pay less is, even to the the jaded among us, shocking.

As the Time, Inc. report brazenly asserts: **"In the media and entertainment business of the future, the winners will own the copyrights to creative products, as well as the avenues of distribution. We intend to increase our ownership of both."**

In other words, they're out to divest writers and artists and photographers -- of copyright. And that's why the bill before you, limiting work for hire, is so important. The creative community needs your support if the copyright laws passed by Congress are to protect creators in the manner you originally intended.

Attached are several examples of work for hire contracts, the kind our authors are pressured into signing every day. Items A and B deserve special note.

Item A is a contract from Country America, a publication of the Meredith Corporation. It is a blanket work for hire agreement covering all articles current and future done for the publication, yielding all rights. Each freelance writer who works for the publication must sign one. It is an egregious example of how copyright loopholes are being stretched into gaping injustices.

Item B is a contract for an article for an anthology about the Supreme Court. The press is Oxford University Press. **Not only does the contract demand work for hire, it also demands that the author "will not publish in a competitive work, or permit publication of in a competitive work, articles by him or her that are similar in subject, scope and length..." to those covered by the contract.** These two clauses together constitute a real economic vise on the author.

The writer in this case, David J. Garrow, is the Pulitzer Prize winning author of "Bearing the Cross: Martin Luther King, Jr. and the Southern Christian Leadership Conference." He refused to sign the agreement. However, the pressure on a lesser-known author to sign would be much greater.

S. 1253 is a good first step; we wish it went even further, granting to authors and creators the right to freely negotiate additional payment for any additional use a publisher makes of our work, giving us a chance to survive the economic stranglehold of the media monopoly.

If you have any additional questions, please contact:

Alec Dubro, President or Kim Fellner, Executive Director
National Writers Union (212) 254-0279

COUNTRY AMERICA

THE MAGAZINE OF THE NASHVILLE NETWORK

Des Moines Office
Locust at 17th
Des Moines, Iowa 50336
(515)284-3000

Quite possibly you are aware that the Copyright Law which went into effect January 1, 1978, requires certain action in order that the work we receive from free-lance contributors continues to meet Meredith's requirement to have full rights to the material we publish.

In setting up the assignments free-lancers do for us, we use a single agreement that covers all of the necessary points in advance. This way all subsequent separate assignments and correspondence pertaining to them need not deal with legal terms. Instead, this allows us simply to concentrate on the individual assignments, the schedules, and the payments to you. In short, we can deal with the legal aspects once and for all and then focus on the work at hand.

We want to emphasize that our requirements to have full rights to material we purchase are the same as they've always been. We simply take this necessary step to enable us to continue fulfilling this need.

We're enclosing the agreement for your review. Will you please sign one copy and return it for our files? The assignment cannot go into effect until the signed agreement is received.

Many thanks for your cooperation. We look forward to working with you.

Cordially,

NP:KRM

Enclosure

Meredith

1

MASTER AGREEMENT

This is an agreement under Iowa law and Federal law, between _____ _____ (CREATOR) and Meredith Corporation (MEREDITH), Des Moines, Iowa, which shall remain effective until terminated in writing as provided in paragraph 6. CREATOR and MEREDITH therefore make the following promises:

WORK MADE FOR HIRE

1. CREATOR shall from time to time create separate works, such as contributions, articles, photos, etc., (hereinafter WORKS) for MEREDITH as requested by MEREDITH. During the term of this agreement all of the WORKS created by CREATOR for MEREDITH are "work made for hire" unless specifically designated otherwise in writing by CREATOR and MEREDITH.

However, in the event any WORK is not a "work made for hire" CREATOR hereby assigns and transfers all right, title and interest in the WORK and any copyright in the WORK to MEREDITH effective as of the date the WORK was created. CREATOR further agrees to cooperate and execute any assignment or other document necessary to secure total ownership rights of all WORKS in MEREDITH since the intent of this agreement is to vest all copyright and ownership rights in the WORKS in MEREDITH including, but not limited to, all copyright, all extensions of copyright, all copyright renewal rights, all derivative rights, and all rights to reproduce, publish, perform, and display the WORKS.

PAYMENT

2. In return, MEREDITH shall pay CREATOR for the separate WORKS an amount to be determined by CREATOR and MEREDITH. This Master Agreement may be supplemented from time to time by separate writings (generally known as work acceptance letters, day rate photography forms, or manuscript billing forms) which specify WORK to be created.

REVERSIONARY RIGHTS

3. In the event any assignment or transfer of a WORK is subsequently terminated in the manner provided by the Copyright Act of 1976 (17 U.S.C. Sec. 203) and the owner of the termination interest in the WORK shall offer to assign, license, or otherwise transfer the WORK or any part of the WORK to others, that owner shall first offer MEREDITH the right to secure the same interest upon the same terms and conditions as offered to others. MEREDITH shall accept or reject such an offer within thirty (30) days of receipt.

CREATOR'S WARRANTY

4. CREATOR warrants and represents that to the best of CREATOR's knowledge all WORKS submitted hereunder are original and have not been previously published or, if previously published, that written consent to use has been obtained on an unlimited basis; that to the best of CREATOR's knowledge, all WORKS or portions thereof obtained through CREATOR from third parties are original or, if

previously published, that written consent to use has been obtained on an unlimited basis; that CREATOR has full power and authority to make this agreement; that to the best of CREATOR's knowledge the WORK prepared by CREATOR does not contain any scandalous, libelous, or unlawful matter. CREATOR will hold MEREDITH harmless for any breach of this warranty. CREATOR does not warrant originality of any materials provided by MEREDITH to CREATOR.

NO OBLIGATION TO PUBLISH

5. MEREDITH is not obligated to publish the WORK. MEREDITH has the right to edit the WORK and use the WORK in any manner desired and also has the right but not the obligation to identify the CREATOR.

RIGHT TO TERMINATE

6. This agreement may be terminated by either party upon forty-five (45) days written notice to the other.

NOTICES

7. All notices and payments made with respect to this agreement shall be addressed as follows:

When to MEREDITH	When to CREATOR
Editorial Planning Director MEREDITH CORPORATION 1716 Locust Street Des Moines, Iowa 50336	_____ NAME _____ ADDRESS _____

NON-ASSIGNABILITY

8. This agreement is non-assignable by CREATOR.

BINDING EFFECT

9. This agreement is binding upon the heirs, executors, administrators, and successors to any of the CREATOR's rights.

INDEPENDENT CONTRACTORS

10. Both CREATOR and MEREDITH are and shall continue to be independent contractors and neither shall be or represent itself to be an agent, employee, partner, or joint venturer of the other.

MEREDITH and CREATOR accept and agree to all of the promises set forth.

MEREDITH CORPORATION	CREATOR
NAME Doris M Eby	NAME _____
TITLE Editorial Director	TITLE AUTHOR
DATE _____	DATE _____
	_____ SOCIAL SECURITY NUMBER

Meredith person requesting Master _____
Country America

EDITOR IN CHIEF
Kermit L. Hall

EDITORS
James W. Ely, Jr.
Joel B. Grossman
William M. Wiecek

THE OXFORD COMPANION
TO THE SUPREME COURT OF THE UNITED STATES

A G R E E M E N T made this day of between Oxford University Press, Inc., 200 Madison Avenue, New York, New York 10016, a Delaware corporation (hereinafter called the "Publisher"), and

J.
David Garrow
Department of Political Science
City College of New York
Convent at 138th Street
New York, NY 10031

(hereinafter called the "Contributor") with respect to written material to be prepared for publication in a work provisionally entitled THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (hereinafter called the "Work").

1. The Publisher hereby commissions the Contributor to write and to assist in preparation for publication the article(s) listed on Schedule A hereto annexed and made a part of this agreement. Each article shall consist of the approximate number of words specified on Schedule A and shall be accompanied by a related bibliography, if so indicated.

2. The Contributor acknowledges that the Publisher has commissioned the article(s) specified on Schedule A as work(s)-for-hire, that the Publisher shall be deemed the Author of the Work as employer-for-hire, and that the copyright in the articles shall belong to the Publisher during the initial and renewal and extended period or periods of copyright in the Publisher's capacity as employer-for-hire.

3. Preparation of articles for publication shall involve the following rights and responsibilities:

(1) The Contributor shall deliver to the Publisher a typed, double-spaced manuscript of each article by the date specified on Schedule A.

(2) The Publisher may have each article reviewed by an editor of the Work, or by a reader specified by an editor, to ensure that it satisfactorily covers the scope described on Schedule A, in the Contributors' Manual, and elsewhere.

(3) It is understood that revisions in articles may be necessary to achieve, in the judgment of the editors and the Publisher, overall balance of coverage in the Work. If requested by the Publisher, the Contributor shall make such revisions in articles as may be required to make them satisfactory to the editors and the Publisher and shall deliver such revisions to the Publisher in accordance with its

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New York, NY 10016

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(212) 725-2972

Linda Halvorson X7287

written request therefor. It is further understood that the Publisher shall have the right to reject any articles that are not satisfactory in form and content to the editors and the Publisher. The Publisher reserves the right not to publish any article even though it is satisfactory in form and content to the editors and the Publisher, provided that the honorarium for said article offered on Schedule A shall be paid to the Contributor.

(4) The Publisher may copyedit manuscripts to make them conform to a style of punctuation, spelling, capitalization, and usage it deems aporopriate to the Work.

4. As full consideration for the Contributor's complete and satisfactory performance of the responsibilities set forth above, the Publisher shall pay the Contributor the honorarium offered on Schedule A upon return of the Contributor's copyedited manuscript(s) approved for typesetting.

5. The Contributor agrees that the Publisher may use the Contributor's name in the Work and in connection with the advertising, sale, and promotion of the Work. The Publisher agrees that the article(s) written by the Contributor shall be signed by the Contributor's name.

6. The Contributor makes the following warranties and representations:

(1) That he or she has full power and authority to enter into this agreement;

(2) That the article(s) written and delivered under this agreement shall be the Contributor's new, unpublished, and (except for material that may be quoted from acknowledged sources) original work and that he or she has not in any manner granted or assigned any of the rights granted to the Publisher hereunder;

(3) That the article(s) written and delivered under this agreement will contain no material that, if published, will be libelous or contrary to law or that would infringe upon any proprietary or personal right or copyright.

7. The Contributor agrees to indemnify and hold harmless the Publisher against any claims, demands, suits, actions, proceedings, recovery, or expense of any nature whatsoever arising from any breach of the warranties and representations herein contained. The warranties, representations, and indemnities contained herein shall survive the termination of this agreement.

8. Except with the written permission of the Publisher, the Contributor agrees that during the term of this agreement he or she will not publish in a competitive work, or permit publication of in a competitive work, articles written by him or her that are similar in subject, scope, and length to those prepared for publication in the Work under the terms of this agree-

written by him or her that are similar in subject, scope, and length to those prepared for publication in the Work under the terms of this agreement. A competitive work is hereby defined as a reference work on the U.S. Supreme Court, similar to the Work in structure, scope, and format, published by a similar publisher for a similar audience. It is understood that the Contributor may be regularly engaged in related studies and in writing and publishing material on subjects similar or identical to those specified on Schedule A. Nothing in this agreement shall be construed to prohibit the Contributor from publishing other articles on the same subjects in works not competitive to the Work.

9. If articles prepared by the Contributor for publication in the Work include quotations of material previously published in sources protected by copyright, the Contributor agrees to secure written permission to reprint such material from the copyright owner(s) and to furnish the Publisher with letters granting permission to reprint that material in the Work. If the Contributor is prevented from securing such permissions by reasons beyond his or her control, the Contributor hereby appoints the Publisher his or her attorney-in-fact for such purposes. It is understood that such quoted material should not be included in articles except in rare circumstances.

10. This agreement shall bind and inure to the benefits of the heirs, executors, administrators, and legal representatives of the Contributor and upon the successors and assigns of the Publisher. However, all obligations of the Contributor, other than the right to receive payment, are personal and non-assignable.

11. This agreement constitutes the complete understanding of the parties and shall be interpreted according to the laws of the State of New York, regardless of the place of execution or performance. No modifications or waivers of any provisions hereof shall be valid unless put in writing and signed by all parties. The parties agree that the state or federal courts of New York shall have exclusive jurisdiction over any litigation arising out of the interpretation or enforcement of this Agreement.

IN WITNESS WHEREOF, the parties hereto have duly executed this agreement on the date above written.

OXFORD UNIVERSITY PRESS, INC.

_____ By _____

Contributor

_____

U.S. Social Security Number
(for U.S. residents only)

Date: March 28, 1989

1. This letter confirms our agreement in which , a division of . commissions me to write a 4,000 word article on Feature: for use in encyclopedias and books to be published by its subsidiaries, affiliates, successors and assigns and to be published by other publishers who contract with for the preparation of other encyclopedias and reference books. I undertake to perform such commission as a work for hire on behalf of .

2. As full consideration for my services and the submission of the article hereunder, no later than , in form and content satisfactory to , shall pay me reasonable expenses up to

3. It is understood that the article shall be 's exclusive property as a work for hire and shall own all rights of whatsoever nature in and to such work, including copyrights and renewals thereof, throughout the world. I shall retain the right to write about this same area for other publishers.

4. Upon the signing of this agreement I will submit biographical data which at option may be used together with my name and likeness in connection with the promotion and sale of encyclopedias and books in which my article appears.

5. I warrant that the article written and delivered under this agreement shall be my new, unpublished, exclusive and (except as to public domain material) original work. If, contrary to the foregoing warranty, my article is an adaptation, either as a whole or in part, of my own previously published material, I will so inform ; if decides to proceed with publication of the article, I understand that the amount of any permission fees paid by to other publishers for reuse of such material shall be deducted from the amount pays me for the article. I warrant that my article will contain no matter which is libelous, violates any copyright or any other personal or proprietary right or is otherwise contrary to law.

Very truly yours,

_____

Agreed to and accepted

By: _____

TESTIMONY REGARDING S. 1253

BEFORE THE
SUBCOMMITTEE ON PATENTS, COPYRIGHTS
AND TRADEMARKS

SUBMITTED BY
THE SONGWRITERS GUILD OF AMERICA
("SGA")

This statement first addresses one particular situation which often arises in the music publishing world and which has distorted the "work-for-hire" provisions in a manner never intended by either the 1976 U.S. Copyright Act or the cases which have followed it. This is the situation in which a music publisher has placed an individual songwriter under a "term" agreement which contains work-for-hire provisions.

An exposition of the facts will clarify the dilemma: In connection with the 1980 hearings of the Copyright Royalty Tribunal to set the rate for mechanical licenses, SGA commissioned an economic study which clearly demonstrated that the vast majority of songwriters, who treat the writing of music and lyrics as a profession, earn under $6,000 per year. While one may assume that this figure has increased in the past nine years, even a 50% increase, to be generous, would hardly represent a living wage in any part of the country.

It is for the foregoing reason that over the past 25 years, a large number of individual music publishers has been fit to encourage the exercise of creative talent by placing writers under service agreements. The nature of each such service agreement is relatively simple:

(a) The songwriter agrees to work for a stipulated monthly sum and to furnish to his/her music publisher all musical compositions written by him/her during that period of time.

(b) The songwriter is not required to work on the premises of the publisher. The songwriter is free to create whatever music and/or lyrics s/he chooses (although often the geographic area of the country may encourage the writing of a particular style of music). The songwriter invariably holds down another job. The songwriter has complete discretion over where s/he composes music.

(c) The songwriter receives a monthly stipend.

(d) The service contract provides that upon publication, the songwriter will receive royalties which accrue from the publication and exploitation of his authorship. Such royalties are usually covered by a separate publication contract.

(e) The royalties payable under part (d) above are often deferred until the monthly stipend has been recouped from the royalties. In other cases, the stipend is a non-recoupable sum.

At the end of the service term, all songs which the songwriter has <u>created</u> during the service term belong to the publisher. Those songs which the publisher actually <u>exploits</u> are covered by the separate publishing agreement, pursuant to which royalties are paid to the songwriter.

Prior to the advent of the 1976 U.S. Copyright Law, it was common that the service contract created an employer-employee relationship between the publisher and songwriter. Whatever may

be said of the status of composers and lyricists as employees-for-hire prior to the 1976 Copyright Law, the same is no longer true after its enactment. Analysis of the above fact pattern reveals that even under the 1976's original definition of "work for hire" and particularly under the decision in Community for Creative Non-Violence v. Reid, 109 S.Ct. 2166, 104 L.Ed. 2d 811 (1989) "CCNV", the songwriter is not a full-time employee, which would bring his or her work within Section 101(1), nor does his/her music or lyrics fall within one of the categories listed in Section 101(2) of the Act's definition of "work for hire." Thus, while Senator Cochran's proposed legislation assists in refining the definition, the bottom line is that even under the existing definition, songwriters who write under service contracts are not employees for hire under the 1976 Copyright Act. Indeed, both their status and their employment situations may be described as extra legal.

A second point is the actual impact that the proposed language will have on the music publishing industry, as opposed to others who are potentially affected by the work-for-hire syndrome, due to the fact that the songwriting community is unique in one important aspect. CCNV and prior cases have a common fact pattern: when the court holds that a work is not "for hire," then one party wins the copyright and the other party loses it. The copyright in effect is transferred in toto from one claimant to the other. Such a transfer can be very disruptive.

That is not true, however, in the vast majority of cases in the songwriting community, as exemplified by the facts stated above. In those cases where a music publisher has, without justification, imposed employment-for-hire status on a songwriter under a service contract, that same contract invariably includes standard assignment of copyright language. Indeed, language of assignment is included in most service contracts because many countries throughout Western Europe do not recognize the concept of employment-for-hire. To secure world rights, a music publisher must also include express language covering assignment of copyright.

Attached as Appendix A hereto is a copy of the form agreement promulgated by The Songwriters Guild of America. It has been called the premiere of songwriters contracts: while it is very protective of their rights, at the same time it recognizes the contributions being made by the music publisher. Even this contract contains an express assignment of copyright. Accordingly, in the vast majority of cases, if a court were to declare that a music publisher did not own the copyright (by reason of its status as an employer-for-hire), the publisher would still own the copyright under the express assignment of copyright language.

The only loss to the music publisher where a service contract is deemed one of assignment as distinguished from

employment for hire is that the writer will ultimately be able to resecure his or her copyright under the provisions of Section 203(b) of the 1976 Copyright Law and will be able to pass on the benefits of the copyright to his or her heirs. This is a minor diminution of rights accorded to a publisher considering that the vast majority of rights that the publisher will continue to exercise over a minimum of 35 years is still protected.

Given these facts, SGA believes that any language which tends to clarify the original intent of the drafters of Section 101 as regards "work for hire" will be helpful.

SGA also urges the inclusion of the proposed additions to the definition of "joint work" in Section 101 of the 1976 Copyright Act. First, specifying that contributions which entitle one to joint authorship be "original contributions" will bring the statute into line with the precedents and should thereby eliminate at least some unquestionably frivolous claims to joint authorship.

Second, and more important, the requirement of a prior written and signed agreement in the case of a specially commissioned work will close a door which the Supreme Court opened in the last paragraph of its opinion in Community for Creative Non-Violence v. Reid, supra, to claims to have co-authored such works. By holding not merely that the case should be remanded to determine whether the sculpture was a joint

work, but that the sole issue was whether the parties intended their contributions to constitute an interdependent whole, the Supreme Court implied that the plaintiff's contributions to the work met the originality standard. Given what the plaintiff actually contributed, the above suggestion can be read to permit a loosening of the judicial standards in this area which inevitably would work to the detriment of songwriters. The proposed statutory language would preclude this result.

The Copyright Act defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." This language predictably has spawned two kinds of disputes: disputes over whether two parties intended that their contributions be merged into an interdependent whole; and disputes over whether a particular party is an "author". Whether someone is an "author" depends on whether that party's contributions to the work at issue are "original."

Whether a contribution is original is a qualitative determination. Elements which have been deemed "original" include "the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words and the emphasis he gives to particular developments." Salinger v. Random House, Inc., 811 F.2d 90, 98 (2d Cir. 1987), cert. denied, 108 S.Ct. 213, 98

L.Ed.2d 177 (1987), quoting Wainright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 95-96 (2d Cir. 1977), cert. denied, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed.2d 759 (1978). Another decision refers to "independent creation" as distinguished from "novelty, uniqueness and ingenuity." Durham Industries, Inc. v. Tomy Corp., 630 F.2d 905 (2d Cir. 1980). In the music context, new lyrics which were added to a song were held not to satisfy the originality standard because they were "in the same vein as the original lyrics." Picture Music Inc. v. Bourne, 314 F.Supp. 640, 647 (S.D.N.Y. 1970), aff'd, 457 F.2d 1213 (2d Cir. 1972), cert. denied, 409 U.S. 997, 93 S.Ct. 320, 34 L.Ed.2d 262 (1972).

This qualitative evaluation is often intertwined with the quantitative question of how much originality makes one an author for purposes of copyright. The Second Circuit has held, for example, that "some substantial, not merely trivial[,] originality," is required. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976). In Picture Music, supra, the application of such criteria to a case involving music resulted in the holding that the restructuring and lengthening of the central melody of "Who's Afraid of the Big Bad Wolf" and the addition of the new lyrics was not "significant" enough to qualify the songwriter as an author of the resulting popular song.

The foregoing demonstrates that the courts have laid down some tough tests to determine when someone may be considered an "author of a work." These standards must be kept in mind when considering the potential impact of the CCNV decision on the frequency of claims of joint authorship by publishers.

An examination of the CCNV opinion indicates that CCNV claimed to have contributed the following to the sculpture:

The idea for a "modern Nativity" scene;

The format of two adults and an infant (inherent in the Nativity theme);

The idea that the figures should be huddled on a grate (based on the observation that homeless people generally recline, as opposed to sit, on steam grates);

The suggestion that the people depicted be black (in light of the fact that most of the homeless in Washington are black);

The decision to make the figures life-sized;

The idea of using special effects, specifically, steam;

The sculpture's title;

The legend beneath the title; and

The fact that homeless people usually using shopping carts instead of suitcases.

It seems fair to say that CCNV conceived of the nature for the display and determined that it should have certain physical characteristics, based on its observations of actual conditions which characterized the subject to be depicted, and selected the complete title for the display. Yet it is questionable whether any of the above contributions, standing alone, would satisfy the standards of originality summarized above. It is arguable that even in combination, CCNV's contributions do not meet those requirements.

The implications of this holding for songwriters become clear if we compare the creative elements of sculpture which were considered in CCNV to the elements of a song or a musical composition. While it is difficult to draw precise parallels between the two kinds of creative works, the following list shows analogous ideas or specifications which music publishers frequently supply, on which, under CCNV, they could conceivably base claims of joint authorship:[1/]

1/ It is unlikely that CCNV would give rise to increased litigation concerning whether two parties intended their contributions to form a interdependent whole: there is ample precedent for the proposition that a composer who composes the music for a song and the lyricist who composes the lyrics intend their contributions to form a whole song with music and lyrics, whether or not they prepare their respective contributions

(Footnote cont'd.)

The idea for a song on a particular topic;

The structural format for a composition (e.g., a chorus and no more than five verses);

Rhythm and time requirements for a composition;

The title for a song or composition;

The instruments for which a piece is to be scored;

The number of voices;

The key; and

The nature of any arrangements.

This possibility seems grossly unfair: publishers should not be able to claim a share of royalties for the simple act of commissioning a song or a composition.

By requiring in the case of a specially commissioned work that both parties sign a written contract before the commencement of the work, the proposed addition to the definition of "joint work" would obviate virtually all of the above potential claims.

(Footnote cont'd. from previous page)

simultaneously and whether or not each even knows the other. See, e.g., Edward B. Marks Corporation v. Jerry Vogel Music Co., Inc., 140 F.2d 266 (2d Cir. 1944); Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1947) ("Melancholy Baby").

Simply stated, without an agreement which meets the statutory standards, a publisher would not be able seriously to entertain such claims, especially in light of the procedural rule which imposes sanctions on attorneys for bringing frivolous claims.

The Songwriters Guild of America

NOTE TO SONGWRITERS: (A) DO NOT SIGN THIS CONTRACT IF IT HAS ANY CHANGES UNLESS YOU HAVE FIRST DISCUSSED SUCH CHANGES WITH THE GUILD; (B) FOR YOUR PROTECTION PLEASE SEND A FULLY EXECUTED COPY OF THIS CONTRACT TO THE GUILD.

POPULAR SONGWRITERS CONTRACT

© Copyright 1978 AGAC

AGREEMENT made this day of , 19 , between

.....

(hereinafter called "Publisher") and .....

.....

(Jointly and/or severally hereinafter collectively called "Writer");

WITNESSETH:

Composition (Insert title of composition here) — 1. The Writer hereby assigns, transfers and delivers to the Publisher a certain heretofore unpublished original musical composition, written and/or composed by the above-named Writer now entitled .....

..... (hereinafter referred to as "the composition"), including the title, words and music thereof, and the right to secure copyright thereon throughout the entire world, and to have and to hold the said copyright and all rights of whatsoever nature thereunder existing, for (Insert number of years here) ..... years from the date of this contract or 35 years from the date of the first release of a commercial sound recording of the composition, whichever term ends earlier, unless this contract is sooner terminated in accordance with the provisions hereof.

Performing Rights Affiliation (Delete Two) → (ASCAP, BMI, SESAC) — 2. In all respects this contract shall be subject to any existing agreements between the parties hereto and the following small performing rights licensing organization with which Writer and Publisher are affiliated:

Warranty — 3. The Writer hereby warrants that the composition is his sole, exclusive and original work, that he has full right and power to make this contract, and that there exists no adverse claim to or in the composition, except as aforesaid in Paragraph 2 hereof and except such rights as are specifically set forth in Paragraph 23 hereof.

Royalties — 4. In consideration of this contract, the Publisher agrees to pay the Writer as follows:

(Insert amount of advance here) → (a) $..... as an advance against royalties, receipt of which is hereby acknowledged, which sum shall remain the property of the Writer and shall be deductible only from payments hereafter becoming due the Writer under this contract.

Piano Copies — (b) In respect of regular piano copies sold and paid for in the United States and Canada, the following royalties per copy:

Sliding Scale (Insert percentage here) → ..... % (in no case, however, less than 10%) of the wholesale selling price of the first 200,000 copies or less, plus

→ .....% (in no case, however, less than 12½) of the wholesale selling price of copies in excess of 200,000 and not exceeding 500,000, plus

→ . % (in no case, however, less than 15%) of the wholesale selling price of copies in excess of 500,000.

Foreign Royalties (Insert percentage here) → (c) .....% (in no case, however, less than 50%) of all net sums received by the Publisher in respect of regular piano copies, orchestrations, band arrangements, octavos, quartets, arrangements for combinations of voices and/or instruments, and/or other copies of the composition sold in any country other than the United States and Canada, provided, however, that if the Publisher should sell such copies through, or cause them to be sold by, a subsidiary or affiliate which is actually doing business in a foreign country, then in respect of such sales, the Publisher shall pay to the Writer not less than 5% of the marked retail selling price in respect of each such copy sold and paid for.

Orchestrations and Other Arrangements, etc. — (d) In respect of each copy sold and paid for in the United States and Canada, or for export from the United States, of orchestrations, band arrangements, octavos, quartets, arrangements for combinations of voices and/or instruments, and/or other copies of the composition (other than regular piano copies) the following royalties on the wholesale selling price (after trade discounts, if any):

(Insert percentage here) → .....% (in no case, however, less than 10%) on the first 200,000 copies or less; plus

→ .....% (in no case, however, less than 12½) on all copies in excess of 200,000 and not exceeding 500,000; plus

→ .....% (in no case, however, less than 15%) on all copies in excess of 500,000.

Publisher's Song Book, Folio, etc. — (e) (i) If the composition, or any part thereof, is included in any song book, folio or similar publication issued by the Publisher containing at least four, but not more than twenty-five musical compositions, the royalty to be paid by the Publisher to the Writer shall be an amount determined by dividing 10% of the wholesale selling price (after trade discounts, if any) of the copies sold, among the total number of the Publisher's copyrighted musical compositions included in such publication. If such publication contains more than twenty-five musical compositions, the said 10% shall be increased by an additional ½% for each additional musical composition.

Licensee's Song Book, Folio, etc. — (ii) If, pursuant to a license granted by the Publisher to a licensee not controlled by or affiliated with it, the composition, or any part thereof, is included in any song book, folio or similar publication, containing at least four musical compositions, the royalty to be paid by the Publisher to the Writer shall be that proportion of 50% of the gross amount received by it from the licensee, as the number of uses of the composition under the license and during the license period, bears to the total number of uses of the Publisher's copyrighted musical compositions under the license and during the license period.

(iii) In computing the number of the Publisher's copyrighted musical compositions under subdivisions (i) and (ii) hereof, there shall be excluded musical compositions in the public domain and arrangements thereof and those with respect to which the Publisher does not currently publish and offer for sale regular piano copies.

(iv) Royalties on publications containing less than four musical compositions shall be payable at regular piano copy rates.

Professional Material and Free Copies — (f) As to "professional material" not sold or resold, no royalty shall be payable. Free copies of the lyrics of the composition shall not be distributed except under the following conditions: (i) with the Writer's written consent; or (ii) when printed without music in limited numbers for charitable, religious or governmental purposes, or for similar public purposes, if no profit is derived, directly or indirectly; or (iii) when authorized for printing in a book, magazine or periodical, where such use is incidental to a novel or story (as distinguished from use in a book of lyrics or a lyric magazine or folio), provided that any such use shall bear the Writer's name and the proper copyright notice; or (iv) when distributed solely for the purpose of exploiting the composition, provided, that such exploitation is restricted to the distribution of limited numbers of such copies for the purpose of influencing the sale of the composition, that the distribution is independent of the sale of any other musical compositions, services, goods, wares or merchandise, and that no profit is made, directly or indirectly, in connection therewith.

Mechanicals, Electrical Transcriptions, Synchronization, All Other Rights — (g) .....% (in no case, however, less than 50%) of: (Insert percentage here)

All gross receipts of the Publisher in respect of any licenses (including statutory royalties) authorizing the manufacture of parts of instruments serving to mechanically reproduce the composition, or to use the composition in synchronization with sound motion pictures, or to reproduce it upon electrical transcription for broadcasting purposes; and of any and all gross receipts of the Publisher from any other source or right now known or which may hereafter come into existence, except as provided in paragraph 2.

Licensing Agent's Charges — (h) If the Publisher administers licenses authorizing the manufacture of parts of instruments serving to mechanically reproduce said composition, or the use of said composition in synchronization or in timed relation with sound motion pictures or its reproduction upon electrical transcriptions, or any of them, through an agent, trustee or other administrator acting for a substantial part of the industry and not under the exclusive control of the Publisher (hereinafter sometimes referred to as licensing agent), the Publisher, in determining his receipts, shall be entitled to deduct from gross license fees paid by the Licensees, a sum equal to the charges paid by the Publisher to said licensing agent, provided, however, that in respect to synchronization or timed relation with sound motion pictures, said deduction shall in no event exceed $150.00 or 10% of said gross license fee, whichever is less; in connection with the manufacture of parts of instruments serving to mechanically reproduce said composition, said deductions shall not exceed 5% of said gross license fee; and in connection with electrical transcriptions, said deduction shall not exceed 10% of said gross license fee.

the Writer in each instance, except (i) that the Publisher may grant such licenses with respect to electrical transcriptions for broadcasting purposes, but in such event, the Publisher shall pay to the Writer that proportion of 50% of the gross amount received by it under each such license as the number of uses of the composition under each such license during each such license period bears to the total number of uses of the Publisher's copyrighted musical compositions under each such license during each such license period; in computing the number of the Publisher's copyrighted musical compositions for this purpose, there shall be excluded musical compositions in the public domain and arrangements thereof and those with respect to which the Publisher does not currently publish and offer for sale regular piano copies; (ii) that the Publisher may appoint agents or representatives in countries outside of the United States and Canada to use and to grant licenses for the use of the composition on the customary royalty fee basis under which the Publisher shall receive not less than 10% of the marked retail selling price in respect of regular piano copies, and 50% of all other revenue; if, in connection with any such bulk or block license, the Publisher shall have received any advance, the Writer shall not be entitled to share thereon, but no part of said advance shall be deducted in computing the composition's earnings under said bulk or block license. A bulk or block license shall be deemed to mean any license or agreement, domestic or foreign, whereby rights are granted in respect of two or more musical compositions.

Television and New Uses

(j) Except to the extent that the Publisher and Writer have heretofore or may hereafter assign to or vest in the small performing rights licensing organization with which Writer and Publisher are affiliated, the said rights or the right to grant licenses therefor, it is agreed that no licenses shall be granted without the written consent, in each instance, of the Writer for the use of the composition by means of television, or by any means, or for any purposes not commercially established, or for which licenses were not granted by the Publisher on musical compositions prior to June 1, 1937.

Writer's Consent to Licenses

(k) The Publisher shall not, without the written consent of the Writer in each case, give or grant any right or license (i) to use the title of the composition, or (ii) for the exclusive use of the composition in any form or for any purpose, or for any period of time, or for any territory, other than its customary arrangements with foreign publishers, or (iii) to give a dramatic representation of the composition or to dramatize the plot or story thereof, or (iv) for a vocal rendition of the composition in synchronization with sound motion pictures, or (v) for any synchronization use thereof, or (vi) for the use of the composition or a quotation or excerpt therefrom in any article, book, periodical, advertisement or other similar publication. If, however, the Publisher shall give to the Writer written notice by certified mail, return receipt requested, or telegram, specifying the right or license to be given or granted, the name of the licensee and the terms and conditions thereof, including the price or other compensation to be received therefor, then, unless the Writer (or any one or more of them) shall, within five business days after the delivery of such notice to the address of the Writer hereinafter designated, object thereto, the Publisher may grant such right or license in accordance with the said notice without first obtaining the consent of the Writer. Such notice shall be deemed sufficient if sent to the Writer at the address or addresses hereinafter designated or at the address or addresses last furnished to the Publisher in writing by the Writer.

Trust for Writer

(l) Any portion of the receipts which may become due to the Writer from license fees (in excess of offsets), whether received directly from the licensee or from any licensing agent of the Publisher, shall, if not paid immediately on the receipt thereof by the Publisher, belong to the Writer and shall be held in trust for the Writer until payment is made, the ownership of said trust fund by the Writer shall not be questioned whether the monies are physically segregated or not.

Writer Participation

(m) The Publisher agrees that it will not issue any license as a result of which it will receive any financial benefit in which the Writer does not participate.

Writer Credit

(n) On all regular piano copies, orchestrations, band or other arrangements, octavos, quartets, commercial sound recordings and other reproductions of the composition or parts thereof, in whatever form and however produced, Publisher shall include or cause to be included, in addition to the copyright notice, the name of the Writer, and Publisher shall include a similar requirement in every license or authorization issued by it with respect to the composition.

Writers' Respective Shares

5. Whenever the term "Writer" is used herein, it shall be deemed to mean all of the persons herein defined as "Writer" and any and all royalties herein provided to be paid to the Writer shall be paid equally to such persons if there be more than one, unless otherwise provided in Paragraph 23.

Release of Commercial Sound Recording (Insert period not exceeding 12 months)

6. (a) (i) The Publisher shall, within .....months from the date of this contract (the "initial period"), cause a commercial sound recording of the composition to be made and released in the customary form and through the customary commercial channels. If at the end of such initial period a sound recording has not been made and released, as above provided, then, subject to the provisions of the next succeeding subdivision, this contract shall terminate.

(Insert amount to be not less than $250) (Insert period not exceeding six months)

(ii) If, prior to the expiration of the initial period, Publisher pays the Writer the sum of $..... (which shall not be charged against or recoupable out of any advances, royalties or other monies thereto for paid, then due, or which thereafter may become due the Writer from the Publisher pursuant to this contract or otherwise), Publisher shall have an additional ..... months (the "additional period") commencing with the end of the initial period, within which to cause such commercial sound recording to be made and released as provided in subdivision (i) above. If at the end of the additional period a commercial sound recording has not been made and released, as above provided, then this contract shall terminate.

(iii) Upon termination pursuant to this Paragraph 6(a), all rights of any and every nature in and to the composition and in and to any and all copyrights secured thereon in the United States and throughout the world shall automatically re-vest in and become the property of the Writer and shall be reassigned to him by the Publisher. The Writer shall not be obligated to return or pay to the Publisher any advance or indebtedness as a condition of such re-assignment, the said re-assignment shall be in accordance with and subject to the provisions of Paragraph 8 hereof, and, in addition, the Publisher shall pay to the Writer all gross sums which it has theretofore or may thereafter receive in respect of the composition.

Writer's Copies

(b) The Publisher shall furnish, or cause to be furnished, to the Writer six copies of the commercial sound recording referred to in Paragraph 6(a).

Piano Copies, Piano Arrangement or Lead Sheet - (Select (i) or (ii))

(c) The Publisher shall

☐ (i) within 30 days after the initial release of a commercial sound recording of the composition, make, publish and offer for sale regular piano copies of the composition in the form and through the channels customarily employed by it for that purpose;

☐ (ii) within 30 days after execution of this contract make a piano arrangement or lead sheet of the composition and furnish six copies thereof to the Writer.

In the event neither subdivision (i) nor (ii) of this subparagraph (c) is selected, the provisions of subdivision (ii) shall be automatically deemed to have been selected by the parties.

Foreign Copyright

7. (a) Each copyright on the composition in countries other than the United States shall be secured only in the name of the Publisher, and the Publisher shall at any time divest itself of said foreign copyright directly or indirectly.

Foreign Publication

(b) No rights shall be granted by the Publisher in the composition to any foreign publisher or licensee inconsistent with the terms hereof, nor shall any foreign publication rights in the composition be given to a foreign publisher or licensee unless and until the Publisher shall have complied with the provisions of Paragraph 6 hereof.

Foreign Advance

(c) If foreign rights in the composition are separately conveyed, otherwise than as a part of the Publisher's current and/or future catalog, not less than 50% of any advance received in respect thereof shall be credited to the account of and paid to the Writer.

Foreign Percentage

(d) The percentage of the Writer on monies received from foreign sources shall be computed on the Publisher's net receipts, provided, however, that no deductions shall be made for offsets of monies due from the Publisher to said foreign sources; or for advances made by such foreign sources to the Publisher, unless the Writer shall have received at least 50% of said advances.

No Foreign Allocations

(e) In computing the receipts of the Publisher from licenses granted in respect of synchronizations with sound motion pictures, or in respect of any world-wide licenses, or in respect of licenses granted by the Publisher for use of the composition in countries other than the United States, no amount shall be deducted for payments or allocations to publishers or licensees in such countries.

Termination or Expiration of Contract

8. Upon the termination or expiration of this contract, all rights of any and every nature in and to the composition and in and to any and all copyrights secured thereon in the United States and throughout the world, shall re-vest in and become the property of the Writer, and shall be re-assigned to the Writer by the Publisher free of any and all encumbrances of any nature whatsoever, provided that:

(a) If the Publisher, prior to such termination or expiration, shall have granted a domestic license for the use of the composition, not inconsistent with the terms and provisions of this contract, the re-assignment may be subject to the terms of such license,

(b) Publisher shall assign to the Writer all rights which it may have under any such agreement or license referred to in subdivision (a) in respect of the composition, including, but not limited to, the right to receive all royalties or other monies owed by the

composition thereunder after the date of termination or expiration of this contract. Should the Publisher thereafter receive or be credited with any royalties or other monies so earned, it shall pay the same to the Writer.

(c) The Writer shall not be obligated to return or pay to the Publisher any advance or indebtedness as a condition of the re-assignment provided for in this Paragraph 8, and shall be entitled to receive the plates and copies of the composition in the possession of the Publisher.

(d) Publisher shall pay any and all royalties which may have accrued to the Writer prior to such termination or expiration.

(e) The Publisher shall execute any and all documents and do any and all acts or things necessary to effect any and all re-assignments to the Writer herein provided for.

Negotiations for New or Unspecified Uses

9. If the Publisher desires to exercise a right in and to the composition now known or which may hereafter become known, but for which no specific provision has been made herein, the Publisher shall give written notice to the Writer thereof. Negotiations respecting all the terms and conditions of any such disposition shall thereupon be entered into between the Publisher and the Writer and no such right shall be exercised until specific agreement has been made.

Royalty Statements and Payments

10. The Publisher shall render to the Writer, hereafter, royalty statements accompanied by remittance of the amount due at the times such statements and remittances are customarily rendered by the Publisher, provided, however, that such statements and remittances shall be rendered either semi-annually or quarterly and not more than forty-five days after the end of each such semi-annual or quarterly period, as the case may be. The Writer may at any time, or from time to time, make written request for a detailed royalty statement, and the Publisher shall, within sixty days, comply therewith. Such royalty statements shall set forth in detail the various items, foreign and domestic, for which royalties are payable thereunder and the amounts thereof, including, but not limited to, the number of copies sold and the number of uses made in each royalty category. If a use is made in a publication of the character provided in Paragraph 4, subdivision (a) hereof, there shall be included in said royalty statement the title of said publication, the publisher or issuer thereof, the date of and number of uses, the gross license fee received in connection with each publication, the share therein of all the writers under contract with the Publisher, and the Writer's share thereof. There shall likewise be included in said statement a description of every other use of the composition, and if by a licensee or licensees their name or names, and if said use is upon a part of an instrument serving to reproduce the composition mechanically, the type of mechanical reproduction, the title of the label thereon, the name or names of the artists performing the same, together with the gross license fees received, and the Writer's share thereof.

Examination of Books

11. (a) The Publisher shall from time to time, upon written demand of the Writer or his representative, permit the Writer or his representative to inspect at the place of business of the Publisher, all books, records and documents relating to the composition and all licenses granted, uses had and payments made therefor, such right of inspection to include, but not by way of limitation, the right to examine all original accountings and records relating to uses and payments by manufacturers of commercial sound recordings and music rolls, and the Writer or his representative may appoint an accountant who shall at any time during usual business hours have access to all records of the Publisher relating to the composition for the purpose of verifying royalty statements rendered or which are delinquent under the terms hereof.

(b) The Publisher shall, upon written demand of the Writer or his representative, cause any licensing agent in the United States and Canada to furnish to the Writer or his representative, statements showing in detail all licenses granted, uses had and payments made in connection with the composition, which licenses or permits were granted, or payments were received, by or through said licensing agent, and to permit the Writer or his representative to inspect at the place of business of such licensing agent, all books, records and documents of such licensing agent, relating thereto. Any and all agreements made by the Publisher with any such licensing agent shall provide that any such licensing agent will comply with the terms and provisions hereof. In the event that the Publisher shall instruct such licensing agent to furnish to the Writer or his representative statements as provided for herein, and to permit the inspection of the books, records and documents as herein provided, then if such licensing agent should refuse to comply with the said instructions, or any of them, the Publisher agrees to institute and prosecute diligently and in good faith such action or proceedings as may be necessary to compel compliance with the said instructions.

(c) With respect to foreign licensing agents, the Publisher shall make available the books or records of said licensing agents in countries outside of the United States and Canada to the extent such books or records are available to the Publisher, except that the Publisher may in lieu thereof make available any accountants' reports and audits which the Publisher is able to obtain.

(d) If as a result of any examination of books, records or documents pursuant to Paragraphs 11(a), 11(b) or 11(c) hereof, it is determined that, with respect to any royalty statement rendered by or on behalf of the Publisher to the Writer, the Writer is owed a sum equal to or greater than five percent of the sum shown on that royalty statement as being due to the Writer, then the Publisher shall pay to the Writer the entire cost of such examination, not to exceed 50% of the amount shown to be due the Writer.

(e) (i) In the event the Publisher administers its own licenses for the manufacture of parts of instruments serving to mechanically reproduce the composition rather than employing a licensing agent for that purpose, the Publisher shall include in each license agreement a provision permitting the Publisher, the Writer or their respective representatives to inspect, at the place of business of such licensee, all books, records and documents of such licensee relating to such license. Within 30 days after written demand by the Writer, the Publisher shall commence to inspect such licensee's books, records and documents and shall furnish a written report of such inspection to the Writer within 90 days following such demand. If the Publisher fails, after written demand by the Writer, to so inspect the licensee's books, records and documents, or fails to furnish such report, the Writer or his representative may inspect such licensee's books, records and documents at his own expense.

(ii) In the further event that the Publisher and the licensee referred to in subdivision (i) above are subsidiaries or affiliates of the same entity or one is a subsidiary or affiliate of the other, then, unless the Publisher employs a licensing agent to administer the licenses referred to in subdivision (i) above, the Writer shall have the right to make the inspection referred to in subdivision (i) above without the necessity of making written demand on the Publisher as provided in subdivision (i) above.

(iii) If as a result of any inspection by the Writer pursuant to subdivisions (i) and (ii) of this subparagraph (e) the Writer recovers additional monies from the licensee, the Publisher and the Writer shall share equally in the cost of such inspection.

Default in Payment or Prevention of Examination

12. If the Publisher shall fail or refuse, within sixty days after written demand, to furnish or cause to be furnished, such statements, books, records or documents, or to permit inspection thereof, as provided for in Paragraphs 10 and 11 hereof, or within thirty days after written demand, to make the payment of any royalties due under this contract, then the Writer shall be entitled, upon ten days' written notice, to terminate this contract. However if the Publisher shall:

(a) Within the said ten-day period serve upon the Writer a written notice demanding arbitration; and

(b) Submit to arbitration its claim that it has complied with its obligation to furnish statements, books, records or documents, or permitted inspection thereof or to pay royalties, as the case may be, or both, and thereafter comply with any award of the arbitrator within ten days after such award or within such time as the arbitrator may specify;

then this contract shall continue in full force and effect as if the Writer had not sent such notice of termination. If the Publisher shall fail to comply with the foregoing provisions, then this contract shall be deemed to have been terminated as of the date of the Writer's written notice of termination.

Derivative Works

13. No derivative work prepared under authority of Publisher during the term of this contract may be utilized by Publisher or any other party after termination or expiration of this contract.

Notices

14. All written demands and notices provided for herein shall be sent by certified mail, return receipt requested.

Suits for Infringement

15. Any legal action brought by the Publisher against any alleged infringer of the composition shall be initiated and prosecuted at its sole cost and expense, but if the Publisher should fail, within thirty days after written demand, to institute such action, the Writer shall be entitled to institute such suit at his cost and expense. All sums recovered as a result of any such action shall, after the deduction of the reasonable expense thereof, be divided equally between the Publisher and the Writer. No settlement of any such action may be made by either party without first notifying the other; in the event that either party should object to such settlement, then such settlement shall not be made if the party objecting assumes the prosecution of the action and all expenses thereof, except that any sums thereafter recovered shall be divided equally between the Publisher and the Writer after the deduction of the reasonable expenses thereof.

Infringement Claims

16. (a) If a claim is presented against the Publisher alleging that the composition is an infringement upon some other work or a violation of any other right of another, and because thereof the Publisher is jeopardized, it shall forthwith serve a written notice upon the Writer setting forth the full details of such claim. The pendency of said claim shall not relieve the Publisher of the obligation to make payment of the royalties to the Writer hereunder, unless the Publisher shall deposit said royalties as and when they would otherwise be payable, in an account in the joint names of the Publisher and the Writer in a bank or trust company in New York, New York, if the Writer on the date of execution of this contract resides East of the Mississippi River, or in Los Angeles, California, if the Writer on the date of execution of this contract resides West of the Mississippi River. If no suit be filed within nine months after said written notice from the Publisher to the Writer, all monies deposited in said joint account shall be paid over to the Writer plus any interest which may have been earned thereon.

(b) Should an action be instituted against the Publisher claiming that the compensation is an infringement upon some other work or a violation of any other right of another, the Publisher shall forthwith serve written notice upon the Writer containing the full details of such claim. Notwithstanding the commencement of such action, the Publisher shall continue to pay the royalties hereunder to the Writer unless it shall, from and after the date of the service of the summons, deposit said royalties as and when they would otherwise be payable, in an account in the joint names of the Publisher and the Writer in a bank or trust company in New York, New York, if the Writer on the date of execution of this contract resides East of the Mississippi River, or in Los Angeles, California, if the Writer on the date of execution of this contract resides West of the Mississippi River. If the said suit shall be finally adjudicated in favor of the Publisher or shall be settled, there shall be released and paid to the Writer all of such sums held in escrow less any amount paid out of the Writer's share with the Writer's written consent in settlement of said action. Should the said suit finally result adversely to the Publisher, the said amount on deposit shall be released to the Publisher to the extent of any expense or damage it incurs and the balance shall be paid over to the Writer.

(c) In any of the foregoing events, however, the Writer shall be entitled to payment of said royalties or the money so deposited at and after such time as he files with the Publisher a surety company bond, or a bond in other form acceptable to the Publisher, in the sum of such payments to secure the return thereof to the extent that the Publisher may be entitled to such return. The foregoing payments or deposits or the filing of a bond shall be without prejudice to the rights of the Publisher or Writer in the premises.

Arbitration

17. Any and all differences, disputes or controversies arising out of or in connection with this contract shall be submitted to arbitration before a sole arbitrator under the then prevailing rules of the American Arbitration Association. The location of the arbitration shall be New York, New York, if the Writer on the date of execution of this contract resides East of the Mississippi River, or Los Angeles, California, if the Writer on the date of execution of this contract resides West of the Mississippi River. The parties hereby individually and jointly agree to abide by and perform any award rendered in such arbitration. Judgment upon any such award rendered may be entered in any court having jurisdiction thereof.

Assignment

18. Except to the extent herein otherwise expressly provided, the Publisher shall not sell, transfer, assign, convey, encumber or otherwise dispose of the composition or the copyright or copyrights secured thereon without the prior written consent of the Writer. The Writer has been induced to enter into this contract in reliance upon the value to him of the personal service and ability of the Publisher in the exploitation of the composition, and by reason thereof it is the intention of the parties and the essence of the relationship between them that the rights herein granted to the Publisher shall remain with the Publisher and that the same shall not pass to any other person, including, without limitation, successors to or receivers or trustees of the property of the Publisher, either by act or deed of the Publisher or by operation of law, and in the event of the voluntary or involuntary bankruptcy of the Publisher, this contract shall terminate, provided, however, that the composition may be included by the Publisher in a bona fide voluntary sale of its music business or its entire catalog of musical compositions, or in a merger or consolidation of the Publisher with another corporation, in which event the Publisher shall immediately give written notice thereof to the Writer; and provided further that the composition and the copyright therein may be assigned by the Publisher to a subsidiary or affiliated company generally engaged in the music publishing business. If the Publisher is an individual, the composition may pass to a legatee or distributee as part of the inheritance of the Publisher's music business and entire catalog of musical compositions. Any such transfer or assignment shall, however, be conditioned upon the execution and delivery by the transferee or assignee to the Writer of an agreement to be bound by and to perform all of the terms and conditions of this contract to be performed on the part of the Publisher.

Subsidiary Defined

19. A subsidiary, affiliate, or any person, firm or corporation controlled by the Publisher or by such subsidiary or affiliate, as used in this contract, shall be deemed to include any person, firm or corporation, under common control with, or the majority of whose stock or capital contribution is owned or controlled by the Publisher or by any of its officers, directors, partners or associates, or whose policies and actions are subject to domination or control by the Publisher or any of its officers, directors, partners or associates.

Amounts

20. The amounts and percentages specified in this contract shall be deemed to be the amounts and percentages agreed upon by the parties hereto, unless other amounts or percentages are inserted in the blank spaces provided therefor.

Modifications

21. This contract is binding upon and shall enure to the benefit of the parties hereto and their respective successors in interest (as hereinbefore limited). If the Writer (or one or more of them) shall not be living, any notices may be given to, or consents given by, his or their successors in interest. No change or modification of this contract shall be effective unless reduced to writing and signed by the parties hereto.

The words in this contract shall be so construed that the singular shall include the plural and the plural shall include the singular where the context so requires and the masculine shall include the feminine and the feminine shall include the masculine where the context so requires.

Paragraph Headings

22. The paragraph headings are inserted only as a matter of convenience and for reference, and in no way define, limit or describe the scope or intent of this contract nor in any way affect this contract.

Special Provisions

23.

Witness: .....

Witness: .....

Witness: .....

Witness: .....

Publisher .....

By .....

Address .....

Writer ..... (L.S.)

Address .....

Soc. Sec. # .....

Writer ..... (L.S.)

Address .....

Soc. Sec. # .....

Writer ..... (L.S.)

Address .....

Soc. Sec. # .....

FOR YOUR PROTECTION,
SEND A COPY OF THE FULLY SIGNED CONTRACT TO THE GUILD.

* * * * *

Special Exceptions to apply only if filled in and initialed by the parties.

☐ The composition is part of an original score (not an interpolation) of

☐ Living Stage Production ☐ Motion Picture ☐ Night Club Revue
☐ Televised Musical Production

which is the subject of an agreement between the parties dated ..... a copy of which is hereto annexed. Unless said agreement requires compliance with Paragraph 6 in respect of a greater number of musical compositions, the Publisher shall be deemed to have complied with said Paragraph 6 with respect to the composition if it fully performs the terms of said Paragraph 6 in respect of any one musical composition included in said score.

Senator DECONCINI. Thank you, Mr. Weisgrau.
Mr. Maisel.

STATEMENT OF JAY MAISEL, PHOTOGRAPHER, NEW YORK, NY

Mr. MAISEL. My name is Jay Maisel. I have been a freelance photographer for 36 years. When you last this long, you get your share of clients, awards, and honors. I have had exhibitions; I've had books on me; I have had great assignments. I teach and lecture.

Finally, I want to show you a few photographs from my stock file. This file brings in income that would not be possible under work for hire and this work would disappear forever.

[Slide projection.]

These pictures have been reproduced nationally and internationally, and in this book. They were all done on assignments with clients who did not ask for work for hire and they would not exist if it were not for the possibility that I had residual rights on these things.

When one starts off in a creative field one has to be very, very concerned—not about one's own self, but about the younger people who are in the field who will be your contemporaries. My concern is that, like me, they photograph for love as well as for money. Creators are always in love with their art. It's something they do on their days off.

When you start in the field, one of the major problems you have to overcome is the cries of parents who ask you, "When are you going to get a real job?" But you persist, and you train for the career despite everything. What keeps you going is faith and a driving urge to create a body of work. It's a labor of love.

Work for hire means that creators lose their rights to their work piece by piece, job by job, until they finally realize that it's all gone and there is nothing left to show for all the effort. They see others, who did not create the work, making money from it—or worse, they find out the work has been discarded or destroyed by the neglect or incompetence of people who had no emotional investment in it.

Work for hire removes from the negotiating table the crucial issue of how, where, and how often the work will be used.

I certainly think the profit motive is a noble one. I am aware that unless publishers profit, they will perish. But up until now, they have prospered very well. I wish them well. We are mutually in need of each other. However, the creators on whom the publishers depend for their content must not be excluded from the fruits of their labor. Creators who never wanted a real job find themselves classed as manufacturers, unable to use collective bargaining, unprotected by unions. Pitted against each other economically, they require costly space, expensive support staff, and huge sums of money for equipment, then they find themselves given a "take it or leave it" ultimatum and risk being blackballed by those who know they won't do work for hire.

Why are these creators so stubborn? Why don't they just sell their pictures and be done with it? Because in determining a fair fee, it must be based on how the work is to be used—once, next week, or once every week for the next 7 years in every magazine

and newspaper in the country? Will it be a trademark, to be used forever? If our clients can tell us that our contribution can be used in any way, and that there is no difference between one usage and a thousand usages, then there is something distinctly wrong with the system.

If I do a great job on a work for hire and a new usage comes out of it, the printer, typographer, paper supplier, trucker, designer will all be paid. If it's an ad, the magazine will be paid and the ad agency will take its commission. Who comes up empty? The photographer.

So why doesn't the client hire these creators, pay them a salary, give them benefits, and own everything? Because they tried it and it doesn't work. The creative spirit is a fragile thing and it dries up when faced with steady employment. [Laughter.]

So the employer ends up hiring freelancers anyway. This is not conjecture; these are my clients. The fresh, unique vision of the freelancer is what they want. Fine. The problem is that they want to treat them as employees but without the benefit of employment. They want it both ways. They want to own and use the work forever, but they won't assume the financial obligation of the employer. No Social Security, no unemployment insurance, no medical, no workmen's compensation, no insurance. If I am hurt or die on the job, they are not responsible. And of course, if I live, their contribution to my retirement or pension fund is zero.

The right of estimating usage is the essence of copyright. Time magazine charges advertisers for space for their ads. They don't charge the same rates for local, regional, national, or international editions; they charge according to usage. It's understood. Yet under work for hire usage is irrelevant. The fee paid is for time and materials without consideration of the total economic value of the contribution.

If a photographer must relinquish his right to his photograph once the shutter closes, his horizons shrink to the diameter of his current paycheck. The attitude that kept America's creative horizons unlimited and made us a dominant force in international art has been to excel.

What I hope you will look at, beyond the monumental inequity, is the larger issue. If you allow this disparity in bargaining power, the terms of employment will become so unattractive as to not attract people of a higher caliber. You risk forfeiting our position as global leaders in the arts. Every day you read of another American industry, business, or institution losing out on the international field of competition. I am concerned, especially at a time in our history when our national creative community holds the vanguard.

I am neither a doomsayer, nor do I mean to belabor the obvious, but if we lose in this field, another field and allied fields—electronics, automobiles, and others—will follow into decline.

I urge you, Mr. Chairman, to restore the ability of freelancers to survive and prosper by limiting work for hire to the limits proposed by S. 1253. I am convinced that the country's full creative potential will only be restored if freelancers reap the benefits of their labors. Work for hire makes that goal difficult, if not impossible, to attain.

[The prepared statement of Mr. Maisel follows:]

STATEMENT OF JAY MAISEL
IN SUPPORT OF S.1253

A Bill to Amend the Copyright Law
Regarding Work Made for Hire

Before the Senate Subcommittee on
Patents, Copyrights, and Trademarks

September 20, 1989

STATEMENT OF JAY MAISEL
IN SUPPORT OF S.1253
BEFORE THE SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS

My name is Jay Maisel. I'm a freelance photographer.

I've been a member of ASMP for 35 years, and I serve on its Board of Directors.

I'm 58 years old and I've been in this business for 36 years. When you stay in one field for that long you have many clients, awards, and honors. I've had my share. I've got gold medals, photographer of the year awards, books of my work, gallery and museum exhibitions, an eight year advertising campaign for United Technologies, and fourteen years of annual reports for Chesebrough Ponds. I work on assignment for other major corporations and advertising agencies. I sell prints to private and corporate collectors, and I teach workshops and lecture extensively. Finally, I have stock picture files that bring in income that would not be possible if "work for hire" had been the rule these last 36 years.

My concern is with younger photographers, those with less success or experience, those already in this field or about to enter it. Like me they photograph for love as well as for money. Creators are always in love with their art. It's something they do on their days off also.

When one starts a career as a photographer or in any other creative field, the first obstacle is the anguished cries

of parents who want to know "When are you going to get a real job?" But you persist, and while training for your life's work, the refrain continues. "Who does such a thing? What are your prospects? Can you make a living at it?"

What keeps you going? For one thing enormous faith that you're going to make it, maybe make it big. And behind it all there is the desire to create, to put together a body of work. It is a labor of love.

"Work for hire" means that creators lose the rights to their work piece by piece, job by job, until they arrive at a point where they look back and say "it's all gone and there's nothing left to show for all the effort". If they sign away their copyright through work for hire, they see their work discarded or destroyed by the neglect or incompetence of people who have no emotional interest in it.

"Work for hire" means I lose control forever over the pictures I take. In 1986 an exhibit and book of my photographs called "Light of America" was displayed at the International Center of Photography. Had I been required to "work for hire" during the years of shooting it took to assemble that body of work, many of those images would have been lost to me and to the public.

Work for hire is divisive, destructive and insidious for photographers, whether they have been in the business thirty

years or thirty days. It deprives us of future earnings from our work, because it robs us of our authorship. We see our creative efforts exploited in contexts we never envisioned by third parties we've never met. In the worst case, we may never know when and how our work appears.

Work for hire means that when a photographer negotiates his fee the crucial issue of how the photograph will be used is taken out of the negotiating process. If work for hire becomes the rule then "take it or leave it" will follow. It's already happening and is reminiscent of the phrase once written in factories: "If you don't come in on Sunday, don't bother coming in on Monday".

It happens even at my level. Recently I've had to turn down more than half of the work offered to me because it comes with the work for hire proviso. I've always refused to sign these agreements. Not only because I believe they are dead ends for me, but because they are intrinsically damaging to the client and my relationship with the client. Why? Because the client will NEVER get the degree of commitment, the extra something from someone who has nothing to gain for doing more.

My clients understand this and they get that extra mile.

Some clients try to bully photographers into signing "work for hire" agreements after the photographs have been taken by withholding payment. I've had that happen and with experience

and proper paperwork, I've been able to avoid it. Less experienced photographers, however, find themselves unable to deal with this and though they start with the best intentions they eventually end up victimized.

I've always thought (rather naively) that copyright laws were meant to protect the individual creator against the overwhelming economic power held by giant corporations and advertising agencies. These agencies and corporations have in the last few years merged and re-merged into still larger entities, concentrating power into fewer and fewer hands.

I am not against "bigness". I certainly think that the profit motive is a noble one. I'm aware that unless the publishers profit, they perish, so in order to have clients I wish them well and have no problem with them making a profit. I'm even agreeable to them making obscene profits (a paradoxical phrase if ever I've heard one, in our capitalist society). However, the creators on whose work publishers depend for their content and existence must not be excluded from those profits. Creators are people who opted not to get "a real job". They have prepared themselves for years and now a at their creative peak. They represent an extremely valuable resource, a talent pool for their clients. They are "craftsmen worthy of their hire". They are necessary to maintain the quality that these clients demand.

Creators are unique small businesses, unprotected by unions, classed as manufacturers, and unable to use collective

bargaining. Pitted against each other economically, they need expensive space in overpriced metropolitan areas where their clients are located. They pay support staffs, invest huge sums in equipment, and then they are told "take it or leave it" or risk being blackballed by agencies which demand "work for hire" as a contingency for being hired at all. This, by the way, is not conjecture; this is not happening in some imagined future, it is happening NOW.

You may ask two questions, why are these people, these creators so stubborn, why don't they just sell their pictures outright and be done with it?

Because when creators determine a fee for an assignment, they consider more than the degree of difficulty. In fairness to themselves and their clients, they must base their price on how their work is to be used. Will it be used only once? Will it be used once in every magazine and newspaper in the country or for 7 weeks, or 7 years? Will it become a trademark to be used forever? To estimate a fair price you must know the usage. If our clients can tell us that our contribution can be used in any way and that there's no difference if it's used for a week or for a year, then there's something distinctly wrong with the system.

If "work for hire" is the law, when the photograph is used in the future, in some other context, there will be no question that the printer, engraver, paper supplier, designer, type house, trucker and messengers will get paid. The magazine

will get paid its space rate and the advertising agency will take its percentage. Guess who gets cut out? The guy who created the image in the first place -- the photographer.

So why don't the corporations, the agencies, the magazines hire these unique people, put them on staff, pay them a salary, give them the fringe benefits and then own all the work outright? Because they tried it and it just doesn't work. The creative spirit is a fragile thing and seems to dry up when faced with steady employment and no chance to control its future. So employers go outside their staff and hire freelancers anyway to get the creative work they want. This is not fantasy, this is a fact of life in major corporations all over the world. These are my clients.

Most clients must rely on the fresh and unique vision of the freelancer to get the qualilty of work they demand. The only problem is they want to treat them as employees, but without providing the fringe benefits of employment. They want it both ways. They want to own and use the work forever but they will not assume the financial obligations of an employer -- they don't want to put anything in the pot for social security, unemployment, medical, dental, workman's compensation, or insurance. If I'm hurt or die on the job, my clients are not responsible. And of course, their contribution to my pension or retirement is an even zero.

At the same time, clients want the work, forever. They say that they pay a premium for "work for hire" but let's think it through. If work for hire becomes universal, prices will continue their downward spiral -- because the biggest negotiation chip, usage, will be gone from the table -- until freelancers will be unable to make a decent living from their work.

If a photographer must relinquish the rights to his photographs once the shutter closes, his horizons shrink to the diameter of his current paycheck. But, if he retains the rights to his work, he has the incentive to work an extra day, shoot an extra roll or risk an innovation. This also benefits the client, and in years to come it may pay off for both parties artistically and financially.

That attitude has kept America's creative horizons unlimited and made us the dominant force in international art. We cannot afford to discourage young talent from entering the creative field nor allow established talent to be forced out by the artistic and economic disincentives "work for hire" creates.

The intent of the laws protecting the rights of individual artists -- no matter what the language -- must be to bring the negotiating power of those individuals into greater parity with the power of huge agencies and corporations. If the spirit of that intent is circumvented, the letter of the law will be unable to prevent the exploitation and ultimate deterioration of America's creative community.

What I hope you will look at beyond the monumental inequity is the larger issue. If you allow the disparity in bargaining power between huge corporations and the creative community to continue to skew the terms of employment, then you risk forfeiting our position as global leaders in the arts. Every day one reads of another American industry, business, or institution losing out on the international field of competition. As an American photographer, I am concerned, especially at a time in our history when our national creative community holds the vanguard. That position is threatened by "work for hire".

I am neither a doomsayer nor do I mean to belabor the obvious, but if terms of employment become terribly unattractive there will be an inevitable decline in the caliber of people and work in this area. Thus another field in which we lead the world, another entire field and all its allied industries will follow electronics, automobiles, and others into decline in a national and global sense.

I urge you, Mr. Chairman, to restore the ability of freelancers to survive and prosper by limiting work for hire to the limits proposed by S.1253. I am convinced that the country's full creative potential will only be restored if freelancers reap the benefits of their labors. Work for hire makes that goal difficult if not impossible to attain.

Thank you for giving me the opportunity to testify on behalf of photographers.

Senator DECONCINI. Thank you.

I want to ask Senator Cochran—I didn't realize you had stayed here—would you like to join us up here, Senator Cochran?

Senator COCHRAN. I'm happy out here, sir. I appreciate the courtesy.

Senator DECONCINI. OK. Fine. [Laughter.]

Mr. Martin.

STATEMENT OF DON MARTIN, CARTOONIST, STUDIOS OF DON MARTIN, MIAMI, FL, REPRESENTING THE GRAPHIC ARTISTS GUILD

Mr. MARTIN. Mr. Chairman, my name is Don Martin, and I am representing the Graphic Artists Guild. Thank you for giving me the opportunity to voice our support of S. 1253, Senator Cochran's artists bill of rights.

I have been a freelance cartoonist for 35 years. My work was featured in MAD magazine. It now appears in my own German and Scandinavian comics, in Cracked magazine, books, advertising, and a comic strip.

[Slide projection.]

Mr. MARTIN. Here are some samples of the work I have produced over the past 35 years. You will see that it is a very distinctive style of drawing and humor, and it has influenced a lot of cartoonists and people in other areas of comedy.

This was done for the Swedish Confederation of Labor Unions. It's a cover for educational material for the younger members.

Senator DECONCINI. You left out the political cartoons. Is there any particular reason? [Laughter.]

Mr. MARTIN. In the mid-1950's when I started, I took MAD's company-owned rights for granted. I was grateful to be working, and believed the company would be fair about original artwork and copyright rights. I was wrong. During my entire working history with MAD, it used its economic muscle to force me to accept a legal fiction that deprived me of a basic intellectual property right—the right to continuing payment for continuing use of my original artistic concepts.

It has always been standard industry practice for fees to be linked to a work's intended usage. I accepted a low payment for my cartoons and gags because they were supposed to appear one time only in a comic magazine. The fact is, anyone who wanted their work to appear in the magazine had to do it on the magazine's terms. After 1976, the following text was stamped on the back of all payment checks:

> The signature hereto by the payee of this check and the signature on behalf of E.C. Creations, Inc. on the front of this check, shall constitute their agreement that the work. . . is a "work made for hire" as that term is defined in section 101 of the Copyright Act of 1976; that payment in full for all of the rights conveyed, including ownership of any physical property, has been received; and that E.C. Creations, Inc., its successors and assigns have all rights to use and re-use the work, in whole or in part, in any language or medium, worldwide, without further consideration.

End of paragraph. Right underneath was a printed line for the payee to sign on.

Although I firmly believe that this arrangement is a legal fiction, if I wanted to get paid I had to sign. For years I could not negotiate

a better deal for myself. My checks always had this block of text on the back. I had to sign or ship out. It was simple. I needed the money, so I signed.

During my association with them, E.C. Creations reprinted my work in special editions of their magazine; put it into book form, into a calendar and stickers and who knows what else, in English and many other languages. These products were sold worldwide and I never made a cent from these re-uses. That wasn't what I contracted for or was paid for. These exploitations of my work are above and beyond what I did the work for.

The economic leverage and the legal fiction imposed upon me has deprived me of 35 years' royalty income, and even the right to profit from the sale of my original artwork or gags. My work can be exploited without my earning anything, without my approving anything, without my knowledge, without anything.

I firmly believe that the way I have been treated by E.C. Creations is contrary to the original concept of work for hire as it appears in the 1976 Copyright Act which, at the time, was called the Creators' Act. By severely limiting the conditions by which commissioned works could be works for hire, Congress attempted to make the bargaining positions of creators and distributors of works more equitable, but the abuses have only gotten worse.

Mr. Chairman, we need a copyright law that is fair to all interested parties, as it was originally intended. That is why the Graphic Artists Guild and I wholeheartedly support Senator Cochran's proposed legislation. Clarifying the need for work for hire agreements to be signed before work has begun will certainly correct the kind of abuse that I and many others like me have suffered when work for hire is presented on the back of a check as a condition of payment.

Senator Cochran's bill of rights is a very positive step toward returning to the original concept of work for hire described by the 1976 Copyright Act and rectifying the injustices which have developed.

On behalf of the Graphic Artists Guild and myself, I again express my gratitude for the opportunity to present our position on this issue. Thank you again for your attention.

[The prepared statement of Mr. Martin follows:]

Testimony Regarding

S. 1253, The Artists Bill of Rights

Before the

Subcommittee on Patents, Copyrights and Trademarks

Presented by

Don Martin,

Cartoonist

On Behalf of

The Graphic Artists Guild

11 West 20th Street, 8th Floor
New York, NY 10011-3704
(212) 463-7730

Summary of Testimony of
Don Martin, Cartoonist,
on S. 1253
The Artists' Bill of Rights

Mr. Martin, a professional cartoonist for almost thirty-five years, strongly supports the enactment of S. 1253, the Artists' Bill of Rights.

Representing the Graphic Artists Guild, Mr. Martin states that Sen. Thad Cochran's bill will stem some of the abusive work-for-hire practices that freelance creators have endured since the passage of the 1976 Copyright Act, specifically work-for-hire agreements stamped on the back of paychecks. This abusive practice requires freelance creators to accept work-for-hire terms as a condition of payment for work already completed, and consequently forces the creator to relinquish authorship and all rights connected with the sale and/or reproduction of the original artwork. Despite his firm belief that this practice is a legal fiction, he presents his own experience at MAD Magazine to illustrate the economic deprivation freelance creators have endured due to the current misinterpretation of the Act.

During his long association with this publication, Mr. Martin's work has been reprinted in magazine special editions, books, calendars and in other ways; translated into many languages and distributed worldwide. Since he never received any additional compensation for these uses, he was denied the basic intellectual property right to continuing payment for use of his original artistic concepts.

Mr. Martin stresses that the kinds of abuses he's endured is contrary to Congress' original concept of work-for-hire in the 1976 Copyright Act, which was known as the "Creator's Act." He emphasizes that Sen. Cochran's Bill of Rights is a positive step towards returning the law to the original work-for-hire concept described in the 1976 Copyright Act.

In conclusion, Mr. Martin requests the committee to carefully consider the provisions of S. 1253 and realize that similar to the "Copyright Remedies Clarification Act," this bill is not a new legislative initiative, but is actually only an effort to return the law to where Congress originally intended it to be.

# # #

Mr. Chairman, my name is Don Martin, and I am representing the Graphic Artists Guild. Thank you for giving me the opportunity to voice our support of S. 1253, Sen. Cochran's Artists Bill of Rights.

As the world's largest advocacy organization representing professional graphic artists, the Guild has a proven track record protecting and advancing the legitimate interests of illustrators, graphic and surface designers, cartoonists, computer artists and other graphic artists. It has been closely monitoring the work-for-hire issue since the 1976 Copyright Act became effective.

I have been a freelance cartoonist for almost thirty-five years. My work was featured in MAD Magazine; it now appears in my own German and Scandinavian comic books, in CRACKED Magazine, books, advertising and a comic strip.

In the mid 1950's, when I started, I took MAD's company-owned rights for granted. I was grateful to be working; and believed the company would be fair about orginal artwork and copyright rights. I was wrong. During my entire working history with MAD, it consistently used its economic muscle to force me to accept a legal fiction that deprived me of a basic intellectual property right -- the right to continuing payment for continuing use of my original artistic concepts.

Although I may not have realized it at the time, I was used by my major client mainly because of my high degree of creative talent and my popularity with young readers.

About eighty-five percent of my cartoons are based on my own ideas and are products of my own creativity. I have always had complete control over what I drew and how I drew it. I have always worked in my own studio when I chose to work, providing my own tools and equipment.

I invoiced clients and was paid as each job was completed, and was never paid a salary. I did not enjoy any of the benefits that salaried employees enjoy, such as unemployment insurance, disability insurance, social security or workers' compensation. And, like any other business, I paid my own overhead and expenses. That's the way I ran my business in the past and the way I still run it today.

It has always been standard industry practice for fees to be linked to a work's intended usage. I accepted a low payment for my cartoons and gags because they were supposed to appear one-time only in a comic magazine. The fact is, anyone who wanted their work to appear in the magazine had to do it on the magazine's terms. After 1976, the following text was stamped on the back of all payment checks:

> The signature hereto by the payee of this check and the signature on behalf of E.C. Creations, Inc. on the front of this check, shall constitute their agreement that the work, labor, services and/or materials (all of which are described as the "Work") described on the face hereof were performed in accordance with a commission from E.C. Creations, Inc., and that the Work is a work made for hire as that term is defined in

> Section 101 of the Copyright Act of 1976; that payment in full for all of the rights conveyed including ownership of any physical property has been received; and that E.C. Creations, Inc., its successors and assigns have all rights to use and re-use the Work, in whole or in part, in any language or medium, worldwide, without further consideration.

End of paragraph. Right underneath was a printed line for the payee to sign on. Although I firmly believe that this arrangement is a legal fiction, if I wanted to get paid, I had to sign. For years I could not negotiate a better deal for myself; my checks always had this block of text on the back. I had to sign or ship out. It was simple. I needed the money, so I signed. Those words are still being stamped on the back of E.C. Creations checks. And artists and writers are still signing on the line.

During my association with them, E. C. Creations reprinted my in work special editions of their magazine; put it into book form, into a calendar and stickers (and who knows what else), in English and many other languages. These products were sold worldwide and I never made a cent for these reuses. That wasn't what I contracted for, or was paid for. These exploitations of my work, are above and beyond what I did the work for. I never had a written contract with MAD, and unless some court finds that the kind of check endorsement I had to sign does not make something a work-for-hire, then I will be prevented from enjoying the fruits of a great deal of my own labor.

E.C. Creations has also refused to return the original artwork. At least The New Yorker Magazine returns the artwork to the creator. I know one artist who sells his New Yorker originals for $1,000. a cartoon. In contrast, a cartoonist/writer who contributed work to E.C. Creations was told that - not only would their work not be returned - it could be burned - destroyed - if E.C. Creations chose to do so.

The economic leverage and the legal fiction imposed upon me has deprived me of thirty-five year's of royalty income and even the right to profit from the sale of my original artwork or gags. My work can be exploited without my earning anything, without my approving anything, without my knowledge, without anything!

I firmly believe that the way I have been treated by E.C. Creations is contrary to the original concept of work-for-hire as it appears in the 1976 Copyright Act, which, at the time, was called the "Creator's Act." By severely limiting the conditions by which commissioned works could be works-for-hire, Congress attempted to make the bargaining positions of creators and distributors of works more equitable. But the abuses have only gotten worse.

Mr. Chairman, we need a Copyright Law that is fair to all interested parties, as it was originally intended. That is why the Graphic Artists Guild and I wholeheartedly support Sen. Cochran's proposed legislation. Clarifying the need for work-for-hire agreements to be signed before work has begun will certainly correct the kind of abuse I have suffered, when work for hire is presented on the back of

a check as a condition of payment. Senator Cochran's Bill of Rights is a very positive step towards returning to the original concept of work-for-hire described by the 1976 Copyright Act and rectifying the injustices which have developed.

I hope the committee will look carefully at this work-for-hire issue and realize it is in the same category as the "Copyright Remedies Clarification Act." It is not really a new legislative initiative, but is actually only an effort to return the law to where the 1976 Copyright Act tried to put it.

I would like to express my gratitude to the officers, staff and members of the Graphic Artists Guild for their ongoing efforts that have helped graphic artists like me realize the moral injustice and economic deprivation inherent in signing false work-for-hire statements.

On behalf of the Graphic Artists Guild and myself, I again express my gratitude for the opportunity to present our position on this issue. I'd like to take this opportunity to submit additional statements by the Graphic Artists Guild that are pertinent to these hearings for appropriate inclusion into the record. Thank you again for your attention.

# # #

Senator DECONCINI. Thank you, Mr. Martin.

Mr. Clancy, I see that we're not going to get any pictorial descriptions of your work, but I have read several of your books and you don't need a picture because you create such a picture in everybody's mind, whether it's a Soviet helicopter or Backfire bomber or what have you.

So we look forward to your testimony. I understand the pictures are about ready to come, though.

Mr. CLANCY. Yes, the movie form of "Red October" is going to be released next March unless the plans change again.

STATEMENT OF TOM CLANCY, AUTHOR, HUNTINGTON, MD

Mr. CLANCY. Good morning. My name is Tom Clancy. I am the author of five novels—"The Hunt for Red October," "Red Storm Rising," "Patriot Games," "The Cardinal of the Kremlin," and "Clear and Present Danger."

My purpose in being here is to speak in support of Senator Cochran's proposed changes in the copyright statute.

I spent much of last week in Baltimore in my role as national chairman of the Patriots of Fort McHenry, a private group celebrating the 175th anniversary of the Battle of Baltimore and the writing of our national anthem. Last Tuesday evening I had the honor to address 175 new citizens, naturalized right under the replica of the battle flag that now resides in the Smithsonian.

I told them that they had come to the right place. Each of them had a dream, and each had chosen to come to a country built by dreamers, for dreamers. I told them that because of that simple fact, the flag that only 200 years ago flew over a narrow coastal strip soon spanned the continent and now even rests on the Moon, not a bad record for a country that began with little more than a set of rules that we call a Constitution.

One of the reasons we have accomplished so much is that this is the place that harnesses dreams, that allows dreamers to reshape the world. We call America a land of opportunity because dreams that succeed are rewarded. That is what opportunity means; and as with so many things that have shaped America, it was mandated by our Federal Constitution.

The purpose of patent and copyright law is to protect and encourage the creator. From that constitutional guidance we have prospered.

Artists, inventors, and writers need such protection. I can quote Thomas Edison for the reason. When a new man arrived at his research laboratory—itself an Edison invention--and asked what the rules were, Edison told him, "Hell, we don't have rules here; we're trying to accomplish something."

Rules, Mr. Chairman, are the province of lawyers and legislators and have little application to creativity. I offer myself as an example.

It is a matter of public record that I was myself embroiled in a nasty copyright dispute only 1 year ago. I regret to say that the terms of the settlement preclude me from discussing it in public, but I can say the following:

In November 1983, when I signed the contract for "The Hunt for Red October," I was an independent insurance agent with a working knowledge of contracts. On reading the book contract I questioned a clause and was given what seemed to be a reasonable answer. Since I was signing up with a publisher which purports to be the unofficial spokesman for the U.S. Navy, and whose board of control is composed almost exclusively of naval officers—the president, by the way, is the Chief of Naval Operations—I assumed that I could take the Naval Institute at its word. That proved not to be the case. In fact, I was repeatedly lied to, and even now the Institute continues to lie about the nature of the dispute while cravenly hiding behind a wall of confidentiality.

To settle that dispute cost me $150,000 in legal fees. Principles cost money, and even a small publisher like the Naval Institute is a multimillion dollar corporation with assets to hire several law firms. And even when an attorney knows that the law may not be entirely on his side, he can use dilatory tactics to pervert what we like to call the American system of justice. Despite all that, I was very fortunate. I had the ability to fight back.

Mr. Chairman, had I not had the resources to defend myself, my ability to use the characters of my own creation would have been impeded or even lost, all because I asked a simple question and mistook a reasonable-sounding lie for an honest answer.

Mr. Chairman, the nature of publishing is fairly simple. Writers create ideas; publishers publish them. Writers are paid royalties in proportion to the success of those ideas. Publishers gamble their money but make a far greater profit in the event of success, because they make the rules under which the business of publishing operates. That's all the advantage they need.

People hire writers and artists to do that which they cannot do themselves. They have told you, and they will tell you, that they are part of the creative process. Mr. Chairman, if that's true, what do they need us for?

There is a story from antiquity about the King of Petra. He commissioned an architect to build his tomb, demanding that it should be the finest ever made. When complete, the King was so satisfied with that work for hire that he had someone put the architect's eyes out. After all, the King had what he wanted; what did he care about everybody else?

Mr. Chairman, that's the issue. Does the Government of our country wish to promote the progress of science and useful arts or does it not? By an unintended accident, the copyright statute has been perverted out of the shape explicitly intended by the framers of our Constitution and ratified by case law throughout our history. You will be told that correcting this inequity is interference with the marketplace, but the marketplace we address here is the marketplace of ideas.

As the Constitution recognizes and as our history has proven, the good of society comes from protecting those who produce ideas, not those who exploit them. We are a nation of dreamers, Mr. Chairman. Our dreams have built a country. Dreams that began here are changing the world, even while we sit in this room. Protect the dreamers, Mr. Chairman, because we are America.

Thank you.

Senator DECONCINI. Thank you, Mr. Clancy.

Let me ask one question that came to my mind. You talked, Mr. Weisgrau and Mr. Martin, I believe, in your testimony where you left the impression that if you don't sign that check that has the contract printed on the back of it, or if you resist—in fact, I got the impression that certain things would happen to you, mainly, that you wouldn't get further work.

Mr. MAISEL. Or paid.

Senator DECONCINI. Well, yes. That's the second question. If you have a contract or an agreement, you are entitled to go to court and get your money, like you would if you were a bricklayer or a house painter and didn't get paid. But the problem that really troubles me is, do you have any examples—and are they frequent, or do you know anybody we could talk to—of people who have experienced blackballing or whatever you would refer to it as in your trade?

Mr. WEISGRAU. Well, I think there certainly are people who have been blackballed. Of course, the problem you have is creating a legal proof of that.

Senator DECONCINI. But the fact that they resisted and didn't get any more contracts———

Mr. WEISGRAU. Senator, I'll give you an example. I was addressing a seminar at Financial Worlds; I do a program each year on corporate annual reports, and I was speaking from a photographer's point of view on the copyright issues. A particular communications director from a drug firm came to me and said, "Do you know Jay Maisel?" And of course, I've known Jay for a number of years. I said, "Yes, I do; why?" He said, "Well, I wish he would change his position because I'm forbidden from working with him because he won't sign a 'work for hire' agreement."

We have many cases reported to us, certainly, where photographers are presented with "work for hire" agreements after the fact on the back of checks. In effect, it is a contract that is imposed after the fact.

Senator DECONCINI. In your opinion, is that a boycott of Mr. Maisel?

Mr. WEISGRAU. I'm sorry?

Senator DECONCINI. In your interpretation, is that a boycott of Mr. Maisel, what that person told you?

Mr. WEISGRAU. I believe so. I believe that when you exclude———

Senator DECONCINI. Are you familiar with that? Or have you had any experiences like that?

Mr. MAISEL. With this issue?

Senator DECONCINI. Yes, with this issue.

Mr. MAISEL. There are certain people who just won't have anything to do with me because they know that I'm going to request that I don't sell all rights. I would assume that I and people in my———

Senator DECONCINI. Have they told you that? Are they that bold, to just say, "Hey, as long as you're insisting, we're not going to use you; we're going to find somebody else"?

Mr. MAISEL. People call up and say, "If you're not going to do 'work for hire' don't even send your portfolio up here because you're now out of the review process."

Senator DECONCINI. How many times has that happened to you, would you say?

Mr. MAISEL. Well, it has happened to me two or three times, but I don't usually handle that kind of call. The people who work with me handle those calls. It has been reported to me more times than that.

Senator DECONCINI. And how about you, Mr. Martin? Do you have any firsthand experience with that, or know of some people?

Mr. MARTIN. I have similar things. People call and want to know if I do buyouts, which is a similar thing, just taking all the rights for a character. I say, "No, I don't work that way," and that's the last I hear from them.

Mr. BASISTA. Mr. Chairman, I think I have an example of the kind that you are looking for.

Senator DECONCINI. Yes, sir. Would you identify yourself for the record, please?

Mr. BASISTA. My name is Paul Basista. I am the executive director of the Graphic Artists Guild.

In compiling the information in preparation for the hearings today, we solicited statements from members of the Graphic Artists Guild. I received one from a man called Rick Bryan, who is an inker; in the comic book industry there are various artists that produce work in various stages of the comic book production. He was known as an inker, working for Marvel Comics.

For years he had received his paycheck with work for hire language stamped on the back, and for years he had crossed it out, until one day he needed to get his check cashed the same day he received it and walked into the executive offices. When his boss saw that he had crossed out the work for hire language, he became outraged and said, "How dare you do this?" And he said, "Well, you can't do this anyway; this is really illegal."

That afternoon he was discharged from the employment of Marvel and for several years basically could not work. The comic book industry is really dominated by two or three publishers, and when they spread the word out, he was unable to find further employment. Now that he is working again, even though he has been in the business for 10 or 15 years, he is only getting beginner's rates.

Senator DECONCINI. Thank you.

Mr. Weisgrau, let me ask you—you mentioned the case of Ms. Schuster.

Mr. WEISGRAU. Yes.

Senator DECONCINI. She was employed under a contract to do this work, and the fee was $3,000? Is that what I understood your testimony to say?

Mr. WEISGRAU. She would have been employed under an oral contract, Senator.

Senator DECONCINI. Under an oral contract?

Mr. WEISGRAU. Usually that type of business is transacted by phone. She is in Texas; the art director for the magazine is in New York.

Senator DECONCINI. So after she submitted the work— she did it all without any advance——

Mr. WEISGRAU. No advance payments.

Senator DECONCINI. I see. So her only recourse was to go to court to enforce the oral contract?

Mr. WEISGRAU. That's right, Senator.

Senator DECONCINI. And for $3,000, it is obvious that that was not a very——

Mr. WEISGRAU. I have cases come across my desk continually for $1,500 or $2,000 or $800 or $600, where the only recourse of the photographer is to go to court. Obviously, they can't afford to do it.

Senator DECONCINI. I'm just going to ask one last question because of time, and I want to yield to my friend from Utah.

We have other panelists after you, representing many of the publishers of America that testify in opposition to this bill, or with some problems with it. Several of the witnesses will testify that they might have to curtail their publishing ventures in the face of economic burdens.

As artists——[Laughter.]

I'm serious; I'm looking for you to be as objective as you can be to these responses, because they're following you. If you were following them, then I would respond to them—as artists, you have publishers who disseminate your work, just as publishers must have you and have your work for publication. It doesn't seem like you can operate without somebody. Our job in Congress is to attempt to balance and not see that one group under this economic artistic system has an advantage. Would you as artists and authors be willing to accept fewer opportunities to publish your work in return for the greater control over your work that it appears to me that S. 1253 would provide?

Mr. CLANCY. Senator, could I respond to that?

Senator DECONCINI. Please do, Mr. Clancy.

Mr. CLANCY. In the case of book publishing, which I know a little bit about, "The Hunt for Red October" had a retail price when published of $14.95. It was wholesaled out by the publisher for $7.50—between $7.50 and $7.75, depending on how many books they shipped out.

Now, the book cost $1.55 to print. The royalty paid me per hard cover copy was about $1.50, so that's $3.00. The gross profit, therefore, from the book was $4.50, or three times what I made. Now, how much more advantage do they need?

Senator DECONCINI. Well, to me you beg the question, Mr. Clancy, in all due respect—it's a market system. If the book couldn't be sold, if you weren't so talented, and it was so enticing and passed on by people who read it, and if the publisher hadn't done, I suspect, a magnificent job of selling the book, maybe they could only sell it for $10.00 or maybe they could only sell it for $8.50.

My point—and I take it the answer is no—but is there any credence to the argument that they have to invest a lot and they have to have a return, or they're not going to be around? That is what we're going to hear. And I don't say that to take sides here; I'm just trying to get your response.

Mr. MAISEL. There's a great deal of credence, but what we're talking about here is a matter of degree and water seeking its lowest level.

The only people that they can save money on are the artists. They can't save money on any of their production costs because the union will send them packing.

Yes, we would definitely accept less work in order to control it more because, ipso facto, we do that right now. We get turned down because we won't—

Senator DECONCINI. Because you can't do it now?

Mr. MAISEL. Right.

Senator DECONCINI. In essence what you're saying then is that under the system now, you can't—you don't have that option?

Mr. MAISEL. Exactly.

Mr. WEISGRAU. Senator, I'd like to speak to that for a moment.

I think that, first of all, the publisher's position is a myth. There is a simple fact that prior to the 1976 act, where these extensive work for hire provisions didn't exist, they didn't have any problems.

You can also point to the works that they publish, whether they be magazines or textbooks. In the industry today, certainly in photography, there is a growing industry called stock photography which is banks of images that the creators own the rights to. Textbook publishers and magazine publishers continually come to these banks and buy the rights that they need to publish those images in their publications. This thought that if they do not have work for hire their publications will collapse is a myth. They go and negotiate rights agreements with creators and with stock photography agencies all the time. They draw examples to the effect that they have to send somebody on assignment in a sudden rush. Generally, the way it operates—certainly in the photography industry—is that if there is something going on in Bangladesh, they don't contract with a photographer in the United States to fly to Bangladesh under a work for hire agreement. They go to one of the major photographic agencies, such as Sigma or Contact or Black Star in New York, and then they will have one of their photographers, who is probably already on the scene or close to it, go and photograph that. They do not get a work for hire on that because agencies will not allow their photographers to work under those work for hire agreements. I mean, that's the deal; they work under one-time rights.

Senator DECONCINI. That's a very good point.

Senator Hatch.

Senator HATCH. I think a lot of good points have been made here today. I am extremely interested in this.

I think we can all agree that the work for hire agreement stamped on the back of a check is a practice that really ought to be abolished. What artist or what creative person or what new author or what young person without, say, the swat of a Tom Clancy, could refuse to sign the check and get the money? It's like you said, Mr. Martin; you had to eat so you signed the check, even though you resented it and didn't appreciate it.

In the case of Mr. Clancy, I presume that this contract contained matters that only a very expert lawyer could have been able to interpret, and yet they misrepresented it to you.

Personally, Senator DeConcini, I don't think that the naval group that published "The Hunt for Red October" was that good at

promulgating the book. I think the book promulgated itself. So he didn't benefit an awful lot from that, in my opinion, although they might feel otherwise.

But I don't think anyone should be under an obligation to expect their pay dependent on their signing conditions that they never agreed to to begin with, on the back of a check. So that's something I think we should look into.

I have a lot of questions I could ask, but I have been intrigued with what has gone on here today. I think, Mr. Chairman, what we need to do on this subcommittee—and I would hope you would consider doing this with me—I think we should have further hearings. We have just scratched the surface here on abusive practices, if I may call them that, in the publishing industry, in the photographic industry, in the whole industry involving copyrights and trademarks—or should I say in the creative arts industries, to put it that way? On equal bargaining positions—we've heard some of that here today, and I'm sure you've just scratched the surface. I'm sure there are lots of situations you could bring out.

I am personally offended by these check endorsement schemes, although if you are a copyright lawyer you would probably have to tell them to do it because so far it appears to be legal.

Unfair contracts, where one side naturally has the best copyright lawyers in the world and the poor young artist or creative person doesn't know what's going on with regard to those contracts as a general rule—as knowledgeable as you people are in your testimony here today, probably none of you qualify—perhaps you do, Mr. Weisgrau; I don't know—to practice law in this particular area. But I have no idea.

I think the question of the author's ownership of characters—you know, when the author creates a character that he clearly wants to continue to utilize in the future, there ought to be some protection for that author. On the other side of that coin, you have authors who are hired to do a specific work that is creative, but it doesn't necessarily mean their own creation of characters. It may be a work of truth, not fiction, and certainly the payer of the copyright ought to have some control over whatever they write under those circumstances. That goes from newspapers to intellectual articles, I suppose.

But to make a long story short, I think we ought to look into the abuses. We might find a pretty fertile area where we could correct some of these abuses that would really protect these constitutional copyright rights, as Mr. Clancy mentioned to me a while back. And they ought to be protected. There are very few rights listed in the Constitution that rise any higher than those copyright rights, or the rights to intellectual property, to put it more succinctly.

I am very intrigued with the whole area. I understand the problems with publishers and I want to make sure that they continue to publish. I want to make sure that they continue to provide opportunities. I want to make sure they continue to make money; God bless them, I hope they make a lot of money off of every person they take on, whether they are newspapers or magazine publishers or photographic disseminators or whatever, or publishers of novels. On the other hand, they shouldn't be taking unfair advantage. Maybe we can come up with some ways of evening the

playing field here a little bit while protecting both sides of the creativity approach.

So if we could, Mr. Chairman, maybe you and I could sit down and consider how we might best do that.

But I appreciate all the testimony we've heard here today and I admire all of you for the work that you do. I hope you are immensely successful in the future in doing exactly that.

Senator DECONCINI. Senator Hatch, thank you. I think that's a good idea.

I also have had a chance to review some of the statements that have been submitted here. I want to thank the witnesses for the time you put into them. These are obviously some thoughtful statements and some good examples of the problems that are there. I must confess that I am no expert at it at all; I didn't realize the abuses were as great as Senator Cochran has been telling us they are all this time. So the testimony has been very helpful. Thank you.

Mr. Maisel, thanks so much for these autographed copies. We accept. Thank you. They are outstanding work.

[Questions asked by Senators, and the answers thereto, subsequently submitted by panel members, follow:]

Responses of Messrs. Weisgrau, Maisel, Martin to Questions Presented by Senator DeConcini

Question 1

Several of you have discussed in your oral and written testimony the work for hire agreements that independent artists may be forced into signing by an employer with superior bargaining power. A fundamental rule of American contract law provides that courts will not uphold unconscionable contracts or contracts of adhesion. This principle has provided protection to those who may be at a severe disadvantage in a contractual bargain. Have the courts given any relief to artists forced into apparently unconscionable work for hire agreements? Have such agreements been upheld by the courts?

Response:

We are not aware of any cases in which a work for hire agreement has been invalidated on the grounds of unconscionability, or in which a court has enforced an arguably unconscionable work for hire agreement. As discussed below, in one case in which an after-the-fact, check-stamped work for hire agreement was challenged by a photographer, he ultimately was forced to settle the case because of high legal costs after defending against the publisher's allegation that his deletion of work for hire language on the check constituted fraud and racketeering. As this case illustrates, the lack of cases invalidating work for hire agreements is due to the inability of

individual creators to pursue legal relief against powerful publishers and other corporations that can afford to litigate any claim, regardless of its strength, until the creator's resources are exhausted.

The case referred to arose out of a dispute between a freelance photographer and member of ASMP, Stan Malinowski, and Playboy Enterprises. (The case is discussed in detail in the Statement For the Record of Richard Weisgrau on Behalf of the Copyright Justice Coalition In Support of S. 1253, pp. 40-42.) Malinowski was commissioned by Playboy to take photographs, but no written agreement assigning copyright ownership was ever signed. Instead, work for hire language was stamped on the back of the checks issued to Malinowski after the work was completed, which stated in part, "Payee acknowledges payment in full for the services rendered on a work made for hire basis in connection with the work named on the face of this check . . . ." By endorsing the checks, Malinowski would also be agreeing to a work for hire agreement.

The language on the back of the checks also provided that any alteration of the work for hire legend would void the check. Nonetheless, Malinowski covered the legend on the checks with liquid paper and added his own copyright claim to them. He then deposited the checks. Subsequently, Playboy reclaimed the proceeds from one check, informing the bank that the check had

been tampered with and was not legally payable. In turn, Malinowski wrote to Playboy, reaffirming his claim of copyright ownership. When Playboy later published some of the photographs, Malinowski sued for copyright infringement, whereupon Playboy countersued, charging Malinowski with fraud and racketeering for altering checks.

In a reported decision, the federal judge in Malinowski's case ultimately ruled that the dispute between Malinowski and Playboy turned upon non-payment rather than copyright infringement and dismissed the case on jurisdictional grounds. See Malinowski v. Playboy Enterprises, Inc., 706 F. Supp. 611 (N.D. Ill. 1989). However, Playboy vowed to pursue its fraud and racketeering claims on appeal if Malinowski did not sign an agreement relinquishing his copyright in the disputed photos in return for payment. Playboy also refused to pay Malinowski previously promised expenses. Malinowski, financially unable to continue litigating with Playboy, acquiesced and signed the agreement forfeiting his copyright rights. He had incurred over $70,000 in legal fees, was forced to liquidate assets merely to stay afloat during this period, and received estimates of $30,000 for prosecuting an appeal.

This case starkly illustrates the consequences to creators of refusing to sign work for hire agreements and demonstrates that publishers, armed with vast legal and corporate resources,

will succeed in wearing down creators with limited financial resources -- even when the creator is willing to "take on" the publisher in an attempt to vindicate his rights.

Thus, the real issue is not one of legal remedy but of practicality. The great majority of photographers, writers and other freelance creators in this country simply cannot afford to engage in legal combat with multi-billion dollar corporations. Richard Weisgrau, Executive Director of the American Society of Magazine Photographers (ASMP), estimates that he receives 15 to 20 requests per week from photographers for financial assistance to resolve legal problems with publishers. Litigation is very expensive and the publishers, unlike independent creators, have the resources to wage long, costly legal battles. In addition, given the ever-decreasing number of publishers and other commissioning parties in the industry, the freelance creator who sues his publisher (even assuming he could afford to do so) risks losing future assignments and jeopardizes his career.

Moreover, it is generally not the work for hire agreement <u>itself</u> that is unconscionable on its face, but rather the methods used to coerce freelancers into signing them. Due to the inequality in bargaining positions between freelancers and the publishers that commission their works, freelancers are presented with work for hire agreements as a take-it-or-leave-it proposition. Contrary to the purposes of the Copyright Act,

standard work for hire agreements used by publishers often require the freelancer to forfeit all rights to all works created in the future. Morever, work for hire agreements are frequently imposed after work on the project has been started or even completed.[1/] Many freelance creators have difficulty maintaining their careers while refusing to sign work for hire agreements presented at the outset of the relationship; they have no chance at all to resist work for hire forfeitures of all rights where publishers misuse their vastly superior bargaining position by imposing after-the-fact work for hire agreements.

The point is not that a freelance creator would be unable to win a lawsuit (after months or years of litigation and thousands of dollars in legal fees) against a publisher who forces the creator to sign an after-the-fact work for hire agreement, but that the freelancer should not be placed in the position of having to litigate the enforceability of the contract in the first place because of the lack of explicit guidance in the current statute. The use of work for hire agreements after the fact is wrong, unfair and contrary to the original intent of the drafters of the work for hire provisions. Congress should make that intent explicit and thus save creators and the courts from years of litigation over the enforceability of after-the-fact work for hire agreements.

1/ Documentation of these abuses is provided in detail in the Statement for the Record of Richard Weisgrau on Behalf of The Copyright Justice Coalition in Support of S.1253.

Contrary to the contention of the magazine publishers' counsel, the enforceability of after-the-fact or "blanket" work for hire agreements is a matter of federal, not state, law. The work for hire provisions of the 1976 Copyright Act specifically provide for the use of written work for hire agreements in certain limited circumstances. Whether after-the-fact agreements comport with the language and purpose of those provisions is, therefore, a question of federal law. The magazine publishers' concession at the recent hearing that after-the-fact work for hire agreements are unenforceable under the law of most states was indeed surprising given their extensive use of those agreements. But their invocation of state law is merely a red herring designed to discourage Congress from redressing a problem that has arisen in the administration of a federal statute (and, it should be noted, that specifically preempts state law, 17 U.S.C. § 301).

The whole purpose behind the requirement of a written agreement was to give the creator a meaningful opportunity to decide whether to enter into a work for hire arrangement. S. 1253 would make explicit that intent by requiring work for hire agreements to be signed before the work is commenced. That requirement would eliminate the need to resort to the courts to decide whether work for hire language stamped on the back of a check for payment -- or any after-the-fact work for hire agreement -- is enforceable. More importantly, the bill's prior

writing requirement and prohibition on blanket work for hire agreements would remove some of the barriers to meaningful and effective negotiation between freelancers and the parties that commission their works.

Question 2

The American system of copyright has been designed to promote the production of artistic works by offering a limited monopoly as an incentive. Several of our upcoming witnesses will emphasize the importance of that incentive to dissemination of creative works. The members of the current panel have emphasized the importance of that incentive for the creation of such works. In your opinion, would the additional protection offered by S. 1253 significantly encourage the creation of artistic works?

Response:

S. 1253 would encourage the creation of works by protecting creators against some of the worst abuses practiced by commissioning parties. Any measures that help creators retain their rights of copyright and authorship encourage creativity. Indeed, the fundamental premise of our copyright system is that encouragement of individual effort by personal gain fosters creativity and thus benefits all of society. The more opportunities creators have to obtain a fair price for their their work, and to retain the right to be considered the "author"

of the work, the greater the incentive to stay in business and produce works of lasting quality. The case statements previously submitted for the record demonstrate that under current work for hire practices, many creators cannot sustain a minimal degree of financial security, causing many to leave their professions entirely. Because the provisions of S. 1253 would help to ensure that creators receive fair compensation for their works, more creators will be able to stay in business, resulting in a greater number of creative works for the public to enjoy and benefit from.

Question 3

We have represented here today several prominent associations of artists and authors, and other such associations have submitted written statements. Attached to the testimony submitted by the Songwriters Guild of America we received a model contractual agreement promulgated by the Guild. This model agreement is designed to protect the interests of both the songwriter and publisher. Are any of you aware of similar initiatives by the associations you represent or by other associations? Is it possible that such associations could come to acceptable terms with publishers through collective bargaining, rather than through intervention by Congress?

Response:

The American Society of Magazine Photographers is not permitted to collectively bargain on behalf of its members, pursuant to a decision of the National Labor Relations Board. Thus, ASMP, like other organizations composed of freelance creators, cannot negotiate on behalf of its members with publishers or other commissioning parties.

The Songwriters Guild of America ("SGA"), the organization that submitted for the record a model agreement between songwriters and music publishers, is similarly not a collective bargaining unit. The model agreement currently used by SGA was created without input from the music publishers' associations because of antitrust restrictions. It is entirely within the discretion of a particular music publisher whether to agree to the terms of the model contract.

Because artists are not exempt from antitrust legislation, artists' organizations cannot require publishers to accept model agreements. Thus, even if a model agreement were created, its effectiveness would depend entirely on the willingness of the publisher to abide by its terms -- which has been notably absent thus far. The publishers and other parties that commission photographs, writings, cartoons, illustrations and other graphic art have demonstrated time and time again that they are unwilling to negotiate over the uses of and rights in freelance creators'

works. Given that ASMP and other voluntary professional organizations cannot collectively bargain on behalf of their members, and that model agreements created by artists are of little value where the other party to the agreement is unwilling to negotiate, congressional intervention is appropriate and necessary to protect freelance creators' interests.

Question 4

Isn't it true that in the area of published works, as distinguished from fine arts, most of what is created wouldn't be created except for the publisher? Most photographs wouldn't get taken, most cartoons wouldn't be drawn if there were no immediate market. Does this indicate that moral rights are less appropriate in this area than in other areas?

Response:

S. 1253 does not concern the issue of moral rights and we are not addressing that issue at this time. We note, however, that the issue of moral rights is properly addressed in a bill introduced by Senator Kennedy, S. 1198, which defines a "work of fine art" to include certain types of photography.

In supporting S. 1253, our purpose is to ensure that creators are afforded basic rights under current law. The issue of moral rights adds another dimension to our current legal structure. We are concerned with the fundamental issue of

ownership of authorship and copyright rights, under current law, in works at the time of their creation (rather than rights in works after they are sold or assigned). S. 1253 would help to ensure that creators are not divested of their authorship and copyright rights without a meaningful opportunity to negotiate over those rights.

Further, we do not accept the premise that if not for the publishers, creative works would not be created. Were it not for the creative output of creators, publishers would have nothing to sell. Publishers have nothing to do with the creation of the market for creative work; they simply exploit that market. The market for creative works would continue to exist without publishers and creators would continue to create without publishers. That publishers are the entities which bring creative works to the market is an insufficient reason to allow them to continue to abuse their bargaining position. The risks taken by freelance creators in creating works which may or may not be accepted, while having to pay all overhead and expenses and while receiving no insurance or other benefits of employment, are far greater than the risks taken by the publishers.

Responses of Messrs. Weisgrau and Martin
To Questions Presented by Senator Leahy

Question 1

Senator Cochran's bill (S. 1253) would revise the definition of employees under Section 101(1) of the 1976 Copyright Act so

that it reaches only "a formal, salaried employee" and would discard the agency test adopted by the United States Supreme Court in Community for Creative Non-Violence v. Reid. You have testified in favor of the "formal, salaried employee" test established by S. 1253. Why is that standard preferable to the Supreme Court's standard?

Response:

The "formal, salaried" employee test proposed by S. 1253 is far preferable to the standard adopted in Community for Creative Non-Violence v. Reid, 109 S.Ct. 2166 (1989) for several reasons. First, the agency law approach adopted by the Supreme Court will require courts, as well as the public, to apply a multiplicity of factors to any given factual situation in order to determine whether a creator is an "employee" for copyright purposes, thereby inviting additional litigation which freelance creators can ill afford. Moreover, under the agency law test, it cannot be predicted with certainty whether a particular person will be considered an employee. The agency law standards must be applied after-the-fact and lack the predictability needed to avoid constant recourse to the courts to determine whether employee status exists. An objective, "bright line" standard for distinguishing between true employees and independent contractors provides predictability and clarity to an otherwise uncertain relationship between the parties, and will provide clear guidance to the courts in ambiguous situations.

In addition, the objective standard proposed by S. 1253 will effectuate the intent of the drafters of the work for hire provisions -- that the term "employee" in section 101(1) of the Copyright Act be limited to only those persons who have an established, ongoing relationship with an employer characterized by the provision of employment benefits to the employee. (See Statement for the Record of Richard Weisgrau on Behalf of the Copyright Justice Coalition In Support of S. 1253, pp. 52-61 for a full discussion of the intent of the drafters of the work for hire provisions).

Finally, given the lengths to which publishers and other corporations have gone to characterize freelance creators as "employees", a clear objective standard is necessary to prevent a repeat of the years of litigation that preceded the Reid decision.

Question 2

S. 1253 also requires that work-for-hire agreements under Section 101(2) must be signed prior to commencement of the work. How will it be determined when work on a project begins? If a contributor, intrigued by a commissioning party's idea, commences sketches or notes for a project before an agreement is reached, when does the project begin?

Response:

S. 1253 would require that a work for hire agreement under Section 101(2) be signed before commencement of the commissioned work. Work is commenced on a commissioned work when the creator takes some tangible step forward in furtherance of its creation after the work is commissioned by the commissioning party (i.e., after the contributor is instructed to create a particular work for a specific purpose). Tangible steps forward may include the commitment of time, expenses or other resources by the creator to that particular project. Sketches done in furtherance of a specific commissioned project, for example, would qualify as "commencement of the work."

Question 3

What effect would the requirement that work-for-hire agreements be signed in advance have on time-sensitive industries, such as the news media, that would find it difficult to draw up agreements with one-time contributors during coverage of fast-breaking news stories?

Response:

The requirement that work for hire agreements be signed before commencement of the work would have virtually no effect on the coverage of fast-breaking news stories. In the case of photographers, for example, time-sensitive or fast-breaking

stories are almost always covered by photographers employed by agencies such as Black Star or Sygma, which have contracts with networks and news media organizations to cover exactly those types of situations. Such agencies have photographers on staff around the world to cover fast-breaking news stories, and even though they do not agree to work for hire arrangements with publishers, their clients (the publishers) manage to survive.

In those situations where an agency staffer is not used, a commissioning party should be required to enter into a work for hire agreement before the project is begun. A photographer sent around the world on assignment may spend a considerable amount of time, money and effort covering the event. The photographer should not be forced to forfeit all rights in the fruits of those efforts without having had any opportunity to discuss the issues of rights and usage beforehand. The possibility of inconvenience to commissioning parties caused by a prior writing requirement is not a valid reason for divesting a freelance creator of the ability to bargain over rights which are vital to his business and livelihood.

Additional Response of Messrs. Weisgrau, Maisel and Martin to Questions Raised At Hearing

We would like to further respond to a question raised at the hearing concerning instances of "blacklisting" which have occurred as a result of a creator's refusal to sign a work for hire agreement imposed by a commissioning party under "take it or leave it" circumstances.

Attached are two work for hire contracts presented to freelance creators by large and well-known commissioning parties. In both cases, when the creators refused to sign the agreements, the commissioning parties made clear that no deviation from work for hire "policy" would be permitted and that the creators would not receive future assignments from them.

The first contract (labelled "A") is the standard purchase order terms and conditions used by Lintas: Campbell - Ewald/Lintas: Ceco Communications, an advertising firm. The contract was presented to a photographer after the photographer delivered the commissioned photograph to the agency. Paragraph 18(a) of the contract provides that "all materials and services supplied by supplier hereunder shall be considered works made for hire as that term is defined pursuant to the United States Copyright Act." When the photographer refused to sign the contract, he was informed that he would not be considered for any future work for the agency.

The second contract (labelled "B") is a standard contract used by Harcourt Brace Jovanovich, Inc. which provides, in paragraph V, that "[a]ll photographs taken by the photographer as a result of this agreement shall be work-for-hire . . . ." In attempting to negotiate the terms of this agreement, the photographer was told that discussion was useless and that work for hire was corporate policy that will not change. The

photographer refused to sign the agreement, and, as a result, was told he would not be permitted to work for Harcourt Brace Jovanovich, Inc.

CONTRACT A

LINTAS:CAMPBELL-EWALD/ LINTAS:CECO COMMUNICATIONS

PURCHASE ORDER TERMS AND CONDITIONS

1. BUDGET AND SPECIFICATIONS

The Supplier agrees to the approved budget and project specifications as stated on the purchase order. If unforeseen circumstances warrant additional costs, the supplier will notify the Lintas:Campbell-Ewald/ Lintas:Ceco Communications (hereinafter jointly referred to as "Agency") Buyer immediately for Agency approval. Any change in cost or any overtime costs must be approved in advance and in writing by the Agency prior to the work being done or Agency will not be liable for payment of such costs. If circumstances such as location photographic shoots do not permit time for written approval, verbal approval must be obtained from the Buyer and must be followed by written approval within 48 hours. However, none of the direction provided Supplier by Agency's Buyer during Supplier's fulfillment of the order shall be considered a change of project specifications nor shall justify a change in the agreed cost unless specifically agreed to in advance and in writing by the authorized Agency Buyer.

2. APPROVAL

Agency may reject any items, articles or materials covered by the order which are in its opinion unsuitable for the purposes for which the same are ordered, and in the event of such rejection Agency will not in any way be liable for any payment therefore.

3. CANCELLATION

The order may be cancelled by Agency at any time prior to its acceptance of the material covered by the order, upon written notice to Supplier. In such event, Agency will pay Supplier, in lieu of the price specified on the face of the purchase order, the direct noncancellable costs theretofore incurred by Supplier and any direct noncancellable committed costs incurred in the performance of its obligations hereunder prior to such cancellation, provided, however, that they are reasonable, that they have previously been approved in writing and that the total amount of such costs shall not exceed the price specified on the face of the order.

4. PAYMENT

The Agency agrees to pay, and Supplier agrees to look solely to Agency for payment, for material covered by the purchase order. Supplier invoices must be received no later than thirty (30) days after delivery of services and/or materials, in order to be considered for prompt payment. Payment will be made within thirty (30) days after receipt and approval/acceptance by Agency Buyer of Supplier's proper invoice.

5. RIGHT TO AUDIT

For a period of one year from the date of final payment of any supplier's invoice, Supplier shall maintain and Agency and/or its designated representatives shall have access to all pertinent ledgers, payroll data, books, records, correspondence, written instructions, drawings, receipts, vouchers and other documents for the purpose of auditing the charges and all allocations related to any work performed by Supplier.

6. INDEMNIFICATION

Supplier agrees to indemnify and hold harmless Agency and their officers, directors, agents and employees from and against all claims, demands, liabilities, damages, losses, allegations, causes of action and lawsuits (including the payment of reasonable attorney's fees) except those resulting from the sole negligence of Agency caused by, arising out of, or resulting from any products, materials or services provided by Supplier hereunder or in connection with this Agreement and/or failure of Supplier or those acting under it to conform to the statutes, ordinances, regulations or other requirements of any governmental authority in connection with Supplier's performance of the services set forth and/or contingent to this Agreement.

7. UNDERSTANDING AS TO STATUS

It is understood that Supplier is an independent contractor and warrants that the services rendered under this Agreement shall be provided in compliance with all national, state and local laws and in compliance with the requirements of any code which may be in effect and applicable. It is understood that Supplier will be the principal in all employment and all other contracts which stem from this Agreement and that Supplier agrees to pay and third parties agree to hold Supplier solely liable for payment, for materials, time or services and expenses incurred pursuant to this Agreement.

8. SAFEGUARDING OF PRODUCT FLOWS

It is agreed that supplier will safeguard or retain all properties, products, packages and materials supplied to Supplier by Agency or purchased by Supplier on Agency's behalf as directed by Agency upon the completion of this Agreement and that Supplier shall have at no time, any right, title or interest therein. Supplier agrees to have all such major properties, products and materials covered by insurance against all loss, damage, hazard and risk in an amount sufficient to cover the replacement thereof.

9. CONFIDENTIALITY

Supplier agrees that, both during the term and after fulfilling the requirements of this Agreement, Supplier will not disseminate, reveal or otherwise make available to others or use for their own purposes any information of Agency or Agency's client business policies and procedures acquired pursuant to this Agreement including, but not limited to, trade secrets and confidential information, advertising matters, ideas, plans, techniques and records, products, business, customers or methods of operation except as required in the performance of Supplier's obligations hereunder. Supplier further agrees to make no reference to the services performed by them hereunder for publicity, advertising or circularizing purposes without Agency's prior written consent.

10. AGENCY SUPERVISION AND APPROVAL

During the course of work, Agency's duly designated representative(s) shall be permitted to be present for any purpose, at any time, at all places, where presentation or preparatory activities occur. Agency shall be notified in advance as to the time and place of all activities.

11. NO IMPLIED WAIVERS

Failure of either party at any time to require performance by the other party of any provision hereof shall in no way affect the right to require full performance any time hereafter, nor shall the waiver by either party of a breach of any provision of this Agreement constitute a waiver of any succeeding breach of same or any other provision nor constitute a waiver of the provision itself.

12. ASSIGNMENT OF AGREEMENT

Supplier shall not assign or transfer this Agreement or any interest therein or any part thereof or delegate any of its responsibilities herein without prior written consent from Agency.

13. APPLICABLE LAW

This Agreement is to be governed by and construed according to the laws of the State of Michigan. Any provision which in any way contravenes the laws of any state or jurisdiction where this Agreement is to be performed shall be deemed not to be a part of this Agreement in such state or jurisdiction but only to the extent necessary to comply with the same.

14. OBLIGATIONS CONTINUING BEYOND THE AGREEMENT TERMINATION DATE

The indemnities and assumptions of responsibility by Supplier set forth in Section 5 shall continue in full force and effect, notwithstanding the termination or cancellation of the Agreement whether by expiration of time, operation of law or otherwise.

15. INSOLVENCY

Agency may cancel this Agreement immediately without liability to Supplier upon the happening of the following or other comparable event.

a. insolvency of Supplier;

b. for the filing of any petition by or against Supplier under any bankruptcy, reorganization or receivership law,

c. Supplier executing an assignment for the benefit of creditors, or

d. appointment of any trustee or receiver of Supplier's business or assets or any part thereof unless such petition, assignment or appointment be withdrawn or nullified within fifteen (15) days of such event.

13. CANCELLATION OR BREACH — AGENCY

Agency reserves the right to cancel all or any part of this Agreement if Supplier:

a. repudiates or breaches any of the terms of this Agreement,

b. fails to perform services as specified by Agency, or

c. fails to make sufficient progress so as to endanger timely and proper completion of services and does not remedy such failure or breach within ten (10) days after receipt of notice from Agency specifying such failure or breach.

17. INSURANCE REQUIREMENTS

It is understood that Supplier will carry, at Supplier's own expense, Worker's Compensation Insurance, Comprehensive General Liability Insurance and Comprehensive Automobile Liability Insurance to cover any injury to persons or damage to property arising out of or in any way connected with the production services rendered.

a. The Worker's Compensation Insurance shall be at least the statutory limits for the state(s) in which services are to be performed or a minimum of $100,000, whichever is greater.

b. The General Liability Insurance must have limits of liability of not less than $1,000,000 per person and $1,000,000 per occurrence for bodily injury and $1,000,000 per occurrence for property damage.

c. The Comprehensive Automobile Liability Insurance covering all owned or rented equipment used in conjunction with the performance of services must be in the amounts not less than $500,000 per person and $500,000 per occurrence for bodily injury and $1,000,000 for property damage.

Supplier agrees that upon request Supplier will exhibit such policies to Agency or furnish Agency with other evidence thereof satisfactory to Agency. It is also understood Supplier will obtain and maintain insurance covering both picture negatives and sound track negatives during production and during such times as any or all of these materials are in possession of Supplier's subcontractors and suppliers. Such insurance shall be drawn in terms, conditions and amounts sufficient to cover the replacement costs of such negatives against all hazards or risks up to the delivery of all materials. Supplier shall furnish Agency with evidence that all such insurance is in effect upon Agency's request.

18. OWNERSHIP

a. Print Purchase Order: Unless otherwise specified on the purchase order, Agency, its successors and assigns or Agency's clients or their successors and assigns shall be the exclusive owner of all rights, including, but not limited to copyrights, in all materials developed or produced for Agency by Supplier. It is specifically understood that all materials and services supplied by Supplier hereunder shall be considered works made for hire as that term is defined pursuant to the United States Copyright Act. Supplier warrants that the materials, when delivered to Agency, will be free and clear of any and all claims, liens, mortgages and any other encumbrances of any kind or character (except with respect to the scripts and materials furnished by Agency), that none of the materials will in any way infringe upon the rights of any person or violate the private, civil or property rights or right of privacy of anyone or any national, state or local law, order or regulation and will in no way constitute a libel, slander or defamation of anyone. Supplier further warrants that Agency or Agency's clients or Agency's successors and assigns will have the unfettered right to copyright this material and to exercise sole and exclusive rights to make copies, sell, exploit, rent, lease, license, distribute, exhibit or otherwise use or dispose of the material throughout the world for any royalty fee or license fee whatsoever.

b. Broadcast Purchase Order: Unless otherwise specified on the Purchase order, all negatives, prints, sound tracks, material exposed and/or processed and all materials and all rights, titles, interests and copyrights therein shall upon creation become the property of Agency, Agency's successor and assigns, or Agency's clients, successors or assigns, as Agency shall in Agency's sole discretion, decide. It is specifically understood that all materials and services supplied by Supplier hereunder shall be considered works made for hire as that term is defined pursuant to the United States Copyright Act. Supplier warrants that the

materials, when delivered to Agency, will be free and clear of any and all claims, liens, mortgages and any other encumbrances of any kind or character (except with respect to the scripts and materials furnished by Agency), that none of the films will in any way infringe upon the rights of any person or violate the private, civil or property rights or right of privacy of anyone or any national, state or local law, order or regulation and will in no way constitute a libel, slander or defamation of anyone. Agency further warrants that Agency or Agency's clients or Agency's successors and assigns will have the unfettered right to copyright this material and to exercise sole and exclusive rights to make copies, sell, exploit, rent, lease, license, distribute, exhibit or otherwise use or dispose of the material throughout the world for any royalty fee or license fee whatsoever.

(1) Quality: It is agreed that each production when completed will be in all respects of first and Class A esthetic and artistic quality and technically equal to current SMPTE and ASA Standards, all subject to our approval and acceptance. All pertinent photography shall be within the television safety margin of the motion picture frame size so as to be visible to the television viewer. All videotape productions must meet with the specifications outlined by the Federal Communications Commission for vertical and horizontal blanking.

19. COMPLETE AGREEMENT

This Agreement contains the binding and complete agreement between the parties hereto and supersedes all other agreements and representations, written or oral, on the subject matter hereof. No additions or modifications to this Agreement shall be effective unless they are in writing, signed by both parties, and make specific reference to this Agreement.

20. MISCELLANEOUS

a. The captions and paragraph headings hereof are inserted for convenience only and shall not be deemed to define, limit or expand the meaning of any provision.

b. If any provision of this Agreement shall prove to be invalid, void or illegal, it shall in no way affect, impair or invalidate any of the other provisions hereof.

A copy of this form must be signed and returned to: Accounting Department, 30400 Van Dyke, Warren, Michigan 48093.

SUPPLIER: _____

BY: _____

TITLE: _____

DATE: _____

WITNESS: _____

HARCOURT BRACE JOVANOVICH, INC.
Orlando, Florida 32887

CONTRACT B

DATE:

THE PHOTOGRAPHER

_____

agrees to perform for HARCOURT BRACE JOVANOVICH, INC. (the Publisher) of Orlando, Florida 32887 the following assignment pertaining to the work tentatively titled

_____

(hereinafter called the Work).

I. The Publisher hereby engages the Photographer to:

(a) Assignment:

_____
Number and type of photographs

as directed by the Publisher and as specified in the attached specification sheet. Arrangements for models and location will be made by:

II. The Photographer accepts such assignment and in consideration of the payments provided hereunder, the Photographer agrees:

(a) To deliver on or before:

(b) To supply with the photographs written permission for use of any materials owned or controlled by others included in the photographs;

(c) To furnish additional photographs if requested by the Publisher, the number of such additional photographs to be no more than 25 per cent of the number indicated in the assignment in I(a).

III. In consideration of the Photographer's performing satisfactorily hereunder, the Publisher agrees:

(a) To pay the Photographer the sum of

_____

as follows:

_____

(b) To reimburse the Photographer for the cost of film processing, props, model fees, travel expenses, and other reasonable expenses incurred in the course of his assignment;

(c) To give to the Photographer for his non-exclusive use:

per cent (

of the photographs not selected by the Publisher, providing such photographs do not require model releases or any other permission;

(d) To acknowledge the Photographer's contribution to the Work, as follows:

IV. The Photographer represents and warrants that all photographs prepared under the terms of this agreement will be original and will not violate any copyright, proprietary right, or other right.

V. All photographs taken by the Photographer as a result of this agreement shall be work-for-hire of which the Publisher is author-at-law and the Publisher shall be the exclusive owner of all rights in the original photographs and reproduction thereof, including all copyrights, extensions of copyright, and renewals. The Publisher shall, at its sole discretion, have the right to use the photographs in the Work and in any other materials or publications, including but not limited to the exclusive right to print, publish, film, display, record, broadcast, transmit, and otherwise reproduce and exploit the Work in its original or adapted form in all languages and formats, in audio-visual form and in all other forms, media and systems, including information storage and retrieval systems, or by any other process now known or hereafter developed.

VI. This instrument, which shall be construed and governed by the laws of the State of Florida, constitutes the whole agreement between the Photographer and the Publisher and can only be amended by an agreement in writing by both the Photographer and an Officer of the Publisher (Harcourt Brace Jovanovich, Inc.). The Photographer acknowledges that the Publisher may publish works and materials dealing with subject matter similar to that contained in the Work, and nothing contained in this agreement shall bar the Publisher from publishing such other works and materials. Nothing in this agreement shall be construed to require the Publisher to act as a trustee for the benefit of the Photographer or otherwise to act as a fiduciary.

RESPONSES OF TOM CLANCY TO QUESTIONS PRESENTED BY SENATOR DECONCINI

1. The fundamental question here is not one of legal remedy but of practicality. The great majority of writers, photographers, and other artists in our country is composed of people earning on the order of $30,000 per year or less. For such people to engage in legal combat with multi-billion-dollar corporations, while technically possible, is not a serious option -- even discounting the ability of the media corporations to black-list their lilliputian enemies. All the large corporation need do is to instruct its legal counsel to delay and obfuscate until the litigant's funds are exhausted, thus winning the case by default.

My own dispute involved a third-rate publisher and one of the top five or so best-selling authors in America. My own financial resources were barely equal to those of my adversary. Principles cost money. Publishers have far more money than any author. Because of that the playing field is heavily weighted against the little guy.

One additional point may need saying. American publishers are being acquired by overseas entities for whom the United States Constitution is no doubt an interesting but foreign document. It is not possible that the thoughts of American creators will to some greater or lesser degree soon be subjected to approval of others for whom American interests and American rules of conduct are simply not relevant? A recent article on the acquisition of Columbia Pictures by Sony quoted Sony's CEO as saying that the purchase would go far to correct American perceptions of Japan. While I have not the slightest reason to doubt the integrity of Mr. Morita, is it possible to read such a statement and not feel a slight chill? I hasten to add that I am also the #1 best-selling author in Japan, and am published world-wide. Red Storm Rising, by the way, was not published in a foreign country for fear of offending its sensibilities. That country is a NATO ally, and one of its corporations now owns a major American media empire. The ownership of American media institutions by foreign agencies, added to the ability of those agencies to control the creative thoughts of American citizens under "work-for-hire" is something quite troubling to me.

2. The Constitutional mandate and its ethos are explicit: the only way for useful ideas to appear at all is to ensure that those who create them are encouraged and protected. However much the publishers may protest that they spread ideas about -- while making a good deal of money in the process -- the Constitution does not mandate their right to disseminate ideas. It mandates our right to be protected from those who try to steal them. Anything that makes our work harder to steal, then, is of benefit to creators and therefore in keeping with Constitutional intent. What the Constitution recognizes are not marketing rights, but rather the simple fact that unless people are encouraged to create new ideas, there will not be many new ideas. Ideas are what built America.

3. The Author's Guild also has a model contract that has gained a fair measure of acceptance with the major trade publishers, but not with many small ones. Presumably there are other such model contracts for other artistic areas, but our ability to encourage their acceptance on the various segments of the publishing industry is impaired by the fact that artists are not exempt from anti-trust legislation.

4. First of all, the issue of "moral rights" is a red herring foisted upon the issue by the publishers for their own propagandistic purposes. My own perspective here is limited to what the framers of the Constitution clearly thought.

Publishers do not create books. If they did, they would have no need of authors. They don't pay us because we are amusing, but because we are essential. We make the product which they sell.

Third, publishers of all sorts exist because people want to read and see ideas and other expressions of the human mind. That is the market. Publishing is a business which connects creators with consumers. A publisher is someone who takes an idea from Person A and sells it to Person B. A publisher creates neither the ideas nor the market. The publisher is the agency which exploits both -- and when done successfully, performs its exploitation to the benefit of all.

The Constitution seeks to promote creativity by protecting creators. Publishers do not need Constitutional encouragement or protection. Adam Smith takes care of them quite nicely.

5. As currently structured, publishers do indeed take the greatest financial risk, and, appropriately, theirs is also the greatest financial reward in the event of success. Please allow me to illustrate how this works:

In the case of my first novel, The Hunt for Red October, each book costs roughly $1.50 to manufacture. My royalties per copy are roughly $1.50. The publisher sells the book to vendors (book stores) for about $7.50, and it was sold to the consumer at whatever price the vendor deemed appropriate. Thus, while my gross income from the book is $1.50, the publisher's gross income is roughly $4.50, or three times what I make per copy. (If someone notes that their gross profit necessarily includes various business expenses, well, so does mine. I have a family to feed and my own living expenses to cover. "Net Profit" to a publisher goes to dividends paid out to stockholders. "Net Profit" to an author is what is left over for savings after his or her day-to-day expenses are met.)

As one can see, the publisher is already given significant reward and incentive to market his product. Following up on this reasoning we see that the act of publishing is in no way heroic. It is, rather, a business, with wholly normal business risks and rewards. By the rules of the publishing game -- drafted, of course, by the publishers themselves -- their marketing and promotional efforts bear greater fruit for themselves than for the authors: In my case by a factor of three-to-one.

The only efforts that a publisher can expend to aid an author are of even greater aid to itself. This sort of enlightened self-interest is the ideal condition for any healthy business, and is precisely the condition which we hope to extend through all aspects of the publishing industry.

The next panel will have Michael Klipper of Leventhal, Senter & Lerman; Victor Kovner, chairman, legal affairs committee, Magazine Publishers; Mr. Nicholas Veliotes, president, Association of American Publishers; and Jack Fishman, a publisher representing the National Newspaper Association.

Gentlemen, both Senator Hatch and I have some time constraints, so we will ask that you summarize your statements. The full statements will be in the record. If you can do that in 3 minutes, that will be helpful here.

We will start with you, Mr. Klipper.

STATEMENT OF MICHAEL R. KLIPPER, LEVENTHAL, SENTER & LERMAN, WASHINGTON, DC, REPRESENTING THE COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY

Mr. KLIPPER. Thank you, Mr. Chairman.

Senator DECONCINI. Welcome back.

Mr. KLIPPER. Thank you again. My name is Michael Klipper; I am a counsel to the Washington, DC, law firm of Leventhal, Senter & Lerman. I appear here today in my capacity as counsel to the Committee for America's Copyright Community [CACC] which is composed of a number of the authors and creators of copyrighted works in this country. A list of our membership is contained in my formal statement, and I will now ask that my formal statement be made a part of the record.

Senator DECONCINI. Without objection.

Mr. KLIPPER. Appearing with me today are representatives of three of the several industries that make up CACC, which itself is composed of large and small businesses.

Today, I have with me representatives of magazines, newspapers, and books, and it had been my intention, Mr. Chairman, to discuss both the moral rights issue and the work for hire issue. My formal statement does in fact address both issues. Given the testimony we've had today and given the limited time we have available, I will turn to the work for hire question.

Senator DECONCINI. Thank you.

Mr. KLIPPER. I will make a series of points within my allotted time.

First, the 1976 Copyright Act was the result of a series of compromises, including one involving the current definition of work for hire. In a real sense, this definition was an important victory for contributors because it was a marked departure from the employer-oriented approach that had evolved by 1976 under the 1909 act.

It is also important to note with respect to clause 2 of the definition, which you've heard something about this morning, that the categories were included there because these works are prepared at the expense, risk, and instance of the publisher or producer. We believe the reasons that prompted Congress to include these categories, to ensure that works were made available to the public, are as valid today as they were in 1976 when Congress acted.

Second, it is important to note that the CCNV case, which has been discussed at some length this morning, was also a landmark victory for contributors. Significantly, by adopting the agency law standard, the Supreme Court in CCNV acknowledged that this test

is sufficient to meet the congressional goal of providing certainty and predictability in the marketplace. In addition, the Court did reject the formal salary approach.

I think it is important to point out that this decision is 3 months old. Employers and commissioning parties alike, in and out of our coalition, are assessing the impact of CCNV. It is simply too soon to gauge the full impact of that case. However, I would note parenthetically that considering the large number of Federal courts that follow the now-discarded supervision and control test, it is quite possible that the dislocation and the adverse effect on business practices could well be substantial. It is too early for us to say.

Fourth, we urge Congress at this time to give the marketplace a chance to adjust to CCNV. We ask that you not consider legislation in this area, especially legislation such as S. 1253, that we believe would upset the delicate balance in the Copyright Act.

I would make three additional points about the legislation.

One, it goes well beyond CCNV and is much more than a mere clarification of that case. As I mentioned, it would reject the agency test adopted by the Court. It would accept the formal salaried approach, which was not adopted by the Court in that case. And it would reach out to address issues not before the Court in CCNV involving clause 2 and the joint work issue.

S. 1253 would undercut the flexibility now found in these provisions of the act by imposing rigid, inflexible rules that ignore the realities of the business world and the marketplace. For example, the formal salaried test ignores various employer-employee relationships that have evolved in recent times in the marketplace. This point is discussed at some length on pages 30 and 31 of my testimony.

Finally, the vague provisions in this legislation—such as what constitutes a formal salaried employee, a term unknown, to our knowledge outside of the *Dumas* case—would invite litigation.

Finally, S. 1253 proceeds on the faulty premise that changes in the work for hire provisions will benefit all contributors. That is just not true. If enacted, it will prohibit longstanding practices that are both beneficial and desired by contributors, employers, and commissioning parties alike.

If I might have another 15 seconds, I would like to add two final thoughts.

We have heard much this morning about blanket agreements. We call them multiple work agreements. They are common in some industries. There are beneficial, again, and desired by parties on both sides, and they are an important tool in some very important industries, such as educational book publishing.

Finally, to the assertions that some have made in their written statements that we're dealing here with work for hire and one-time payments, I would say that work for hire does not define the form of payment under a work for hire agreement. The provisions allocate ownership under the Copyright Act. In fact, as my testimony states, various forms of compensation are utilized, including royalties under such agreements.

Thank you, Mr. Chairman.

[Mr. Klipper's submissions for the record follow:]

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STATEMENT OF THE COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY

ON MORAL RIGHTS AND S. 1253

BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

SENATE JUDICIARY COMMITTEE

101st CONGRESS, FIRST SESSION

SEPTEMBER 20, 1989

Summary of Statement of the Committee for America's Copyright Community

The Committee for America's Copyright Community ("CACC") strongly opposes both (1) efforts to inject moral rights into federal law, especially the Copyright Act, and (2) S. 1253.

I. Moral Rights. The goal of the Copyright Clause of the Constitution is ensuring public availability of a broad, diverse array of intellectual and artistic works. The vitality of U.S. copyright industries, which today provide both American and foreign consumers with a vast array of U.S. copyrighted works, demonstrates that this constitutional goal is being met by our current system.

The success of our copyright system is due, in part, to the operation of the Copyright Act, which (1) gives copyright owners the financial incentive to devote resources and energy to produce and disseminate creative works; (2) provides the certainty that business activities will be governed by objective terms set forth in the four corners of business agreements; and (3) allows copyright owners and users the flexibility to devise agreements that make works available to the public.

CACC believes that expressly incorporating moral rights into federal law would threaten the on-going success of our copyright industries. In sum, we believe that moral rights would (1) inject great uncertainty into the marketplace and thus make it extremely difficult for copyrighted works to be made available to both primary and ancillary markets; (2) cause copyright owners and users to worry that even their most routine activities could subject them to lawsuits; (3) seriously inhibit the ability of many of our copyright-intensive industries to attract potential investors; (4) put federal judges in the position of making aesthetic judgments about the quality of copyrighted works; (5) conflict with key provisions of the Copyright Act; and (6) be at odds with our nation's commitment to freedom of contract. Therefore, CACC urges Congress to adhere to its long-standing practice of not expressly incorporating moral rights into federal law, including the Copyright Act.

II. Work-Made-for-Hire. S. 1253 is objectionable for a number of reasons. First, S. 1253 would make major changes in the work-made-for-hire definition in the Copyright Act at a time when employers and commissioning parties are assessing the impact of the CCNV decision, which was a landmark victory for contributors. Second, S. 1253 is much more than a mere clarification of CCNV; in particular, it rejects the Supreme Court's resolution of how to determine who is an employee under the first prong of the work-made-for-hire definition. Third, S. 1253 would reduce flexibility in the marketplace by altering the definition of work-made-for-hire to impose rigid, formalistic rules. Finally, S. 1253 proceeds on the faulty assumption that its changes will benefit all contributors.

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September 20, 1989

Introduction

Mr. Chairman, my name is Michael R. Klipper. I am of counsel to the Washington, D.C. law firm of Leventhal, Senter and Lerman. I appear here today in my capacity as counsel to the Committee for America's Copyright Community (CACC).

CACC is composed of representatives of a variety of America's copyright creators and users. Its members include the creators and producers of newspapers, books, magazines, newsletters, computer software and databases, educational testing and training materials, information services, motion pictures and other video and film products, music, as well as commercial broadcasters (see Attachment A).

The members of CACC have joined together out of their concern over legislative efforts that threaten the constitutional goals of promoting the production and dissemination of creative works. In particular, our members are concerned about

proposals that would expressly inject moral rights[1/] into federal law, including the Copyright Act. Also of concern to our members are legislative efforts that will constrict the work-for-hire doctrine of the Copyright Act.

CACC believes that, if enacted, such proposals would adversely affect many of the traditional business practices and relationships that are fundamental to the daily operation of copyright-intensive industries in this country. Ultimately, such legislation would inhibit the paramount goal of the constitutional grant of copyright.

Appearing with me today are representatives from three of the several industries that make up CACC -- the publishers of newspapers, magazines and books. Before turning to my colleagues, I will provide the Subcommittee with an overview of CACC's concerns about moral rights. I will explain why CACC believes that the success of our copyright system is attributable, in large part, to the fact that our copyright law is grounded in economic, objective precepts designed to benefit

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1/ For purposes of this statement, the phrase "moral rights" refers generally to the rights of (1) paternity -- the right of authors to claim authorship of their works, and (2) integrity -- the right of authors to object to alterations of their works that harm their honor or reputation.

the public and not in subjective judgments inherent in a moral rights regime. I will set forth why CACC believes that the injection of moral rights into federal law, including the Copyright Act, would radically and adversely alter our highly successful copyright system to the detriment of not only all involved in the creative process, but inevitably to consumers as well.

I will then address the work-for-hire issue and explain briefly why CACC strongly opposes S. 1253.

I. Moral Rights and the U.S. Copyright System

A. The American Copyright System Is Working.

American consumers are the beneficiaries of a copyright system that has helped make available to them an enormous array of copyrighted works. Whether the public desires entertainment, news, or business information, a cornucopia of works -- including magazines, newspapers, motion pictures and other video and film products, books, radio and television programming, computer software, information products, and sound recordings -- exists to satisfy that demand.

In an era of staggering trade deficits, when many American industries are struggling to stay competitive internationally, the U.S. copyright community stands out as an

invaluable trade asset. It is estimated that America's copyright community contributes a surplus of over $13 billion annually to the U.S. trade balance.2/

The following examples attest to the on-going success of our copyright-intensive industries:

* American films appear on theatre and TV screens throughout the world and contribute annually a surplus of approximately $2.5 billion to the U.S. trade balance. In contrast, as the Washington Post recently reported, "foreign-made films barely make a ripple in the United States."3/

* The American consumer magazine industry is by far the largest in the world. Approximately six billion issues or copies of American-created magazines are published, bought and

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2/ International Intellectual Property Alliance, Trade Losses Due to Piracy and Other Market Access Barriers Affecting the U.S. Copyright Industries (April 1989), quoted in Copyright Moral Rights: Visual Artists Rights Act: Hearing on S. 1198 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 101st Cong., 1st Sess., Statement of Jack E. Brown 3 (June 20, 1989)(unpublished manuscript).

3/ Washington Post, March 26, 1989, at H1.

read in the U.S. every year. At the same time, American magazines have a pervasive worldwide presence.

* The Commerce Department reports that the United States is the largest provider of database services in the world.4/ Eighteen of the twenty leading international databases (ranked by number of customers) originate in the United States.5/ The Commerce Department also reports that the demand for electronic database services is projected to increase at a high rate -- by 20% annually -- through 1993, with revenues reaching $16 billion.6/

* U.S. music is played wherever you go; sound recordings made in America make up half of the music heard around the world.

4/ U.S. Department of Commerce, 1988 U.S. Industrial Outlook at 51-54 (Jan. 1988), quoted in Berne Convention Implementation Act: Hearing on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st and 2nd Sessions 724-725 (1987, 1988).

5/ Berne Convention Implementation Act: Hearing on H.R. 1623, supra note 4, at 725-726.

6/ U.S. Department of Commerce, 1989 U.S. Industrial Outlook at 45-5 (Jan. 1989).

* American textbooks and educational training and audiovisual materials continue to set educational standards throughout the world in innumerable disciplines, such as accounting, business management, science, engineering, medicine, and many other subjects.

B. The Success Of Our Copyright System Is Due, In Large Part, To The Operation Of Our Copyright Act.

The goal of the Copyright Clause of the Constitution is ensuring public availability of a broad, diverse array of intellectual and artistic works. The vitality of the U.S. copyright industries demonstrates that this constitutional goal is being met.

Our Founding Fathers concluded that the best way to maximize the public availability of creative works was to provide economic incentives to authors and creators. Thus, our Copyright Act establishes an economic framework that encourages the creation and dissemination of new works. This framework is composed of three fundamental elements.

First, our Copyright Act gives copyright owners the financial incentive to devote resources and energy to producing and disseminating creative works. Copyright owners, whether business entities or individuals, know they will have the

opportunity to exploit for financial gain the exclusive rights granted to them under the Copyright Act. This is consistent with the economic philosophy of the Copyright Clause[7/] "that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"[8/]

Second, the Copyright Act provides the predictability and certainty that business activities will be governed by the objective terms set forth in the four corners of business agreements. This predictability and certainty allow both copyright owners and copyright users to engage in the advance planning that is so crucial to the proper functioning of our copyright system.

Third, the Copyright Act allows both owners and users the commercial flexibility to devise and implement their own business arrangements to make works available to the public. Today, owners and users are free to enter into business agreements that allow for creative works to be adapted so that they can be made available to the public through new media and new delivery systems.

7/ U.S. Const. art. I. Sec. 8, cl. 8.

8/ Mazer v. Stein, 347 U.S. 201, 219 (1954).

C. A Moral Rights Amendment To Our Copyright Act Would Radically Alter Our Highly Successful Copyright System.

Mr. Chairman, historically, Congress has refrained from expressly incorporating moral rights into federal law, including the Copyright Act. Indeed, as you and your colleagues well know, just last year the full Senate Judiciary Committee stated that moral rights, as that term is understood in other nations, "are not provided for in U.S. statutes, and various decisions of state and federal courts have rejected claims that were denominated specifically as 'moral rights' or that sought relief under the 'moral rights' doctrine."9/

Furthermore, the 100th Congress concluded that an amalgam of state and federal law10/ satisfies our obligations under Article 6bis of the Berne Convention that authors be accorded the rights of paternity and integrity.11/ Significantly, while Congress concluded that U.S. law conformed

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9/ S. Rep. No. 352, 100th Cong., 2nd Sess. 9 (1988) (emphasis supplied).

10/ According to the Senate Judiciary Committee Report, "this existing U.S. law includes various provisions of the Copyright Act and the Lanham Act, various state statutes and common law principles such as libel, defamation, misrepresentation and unfair competition, which have been applied by courts to redress authors' invocation of the right to claim authorship or the right to object to distortion." Id. at 9-10.

11/ Id.

with 6bis, the full Senate Judiciary Committee also made clear that "the 'moral rights' doctrine is not incorporated into U.S. law by this [the Berne implementing] statute."[12/]

Mr. Chairman, CACC urges Congress to continue to adhere to the long-standing practice of not formally adopting the moral rights doctrine into federal law. It should turn aside efforts to amend federal law to expand the protections already found by Congress to satisfy U.S. obligations under 6bis.[13/] Congress should reject the invitation of the Copyright Office to "seriously consider" a uniform federal system of moral rights.[14/] Let me briefly explain why.

12/ Id. at 10.

13/ We recognize that S. 1198, the Visual Artists Rights Act of 1989, would amend the Copyright Act to give a certain class of artists the rights of integrity and attribution with respect to a narrow class of works of art. CACC takes no position on this bill. In large part, our neutrality is premised on the crucial facts that (1) the legislation is limited to such an extremely narrow class of one-of-a-kind or limited editions of works of visual art -- a class of copyrighted works that is unique and clearly distinguishable from every other class of copyrighted material, and (2) the bill as introduced does not appear to impact directly or indirectly upon the business activities of any of our members.

14/ A Report of the Register of Copyrights, Technological Alterations to Motion Pictures (March 1989). Significantly, the issue of such a unified system was not the focal point of the study; in fact, it was barely touched upon in the Report.

First, U.S. copyright law grants economic rights to copyright owners so that they have the incentive to create new works for the public. However, moral rights are non-economic. They are personal in nature; their ultimate goal is to benefit the individual, not the public.15/ As such, they do not fit within the economic framework that defines our copyright system.

In addition, moral rights are subjective and turn on personal preferences. As a result, they could well be obstacles to an entrepreneur's efforts to make works available to the public. Thus, moral rights are anti-entrepreneurial and run counter to the long-standing practice in America that business relations are to be governed by negotiations and agreements made in the marketplace, and not by personal preferences articulated after the marketplace has spoken.

Second, moral rights legislation will subvert the predictability and certainty that, as discussed above, are crucial to the ability of copyright owners to increase public access to new works, as well as to maximize public access to existing works.

15/ Id. at 559 (Appendix I: Public Comments).

Currently, copyright owners and users enter into business dealings secure in the knowledge that these arrangements will not be altered by after-the-fact, subjective determinations. However, under a moral rights regime this would not be the case. This is especially true with respect to copyrighted works that are collaborative in nature -- works in which dozens, sometimes hundreds or even thousands, of individuals contribute to the product. In such settings it is absolutely essential that the copyright owner have the discretion to meld these myriad contributions into a cohesive product. If, however, each of these individuals were free to invoke an "aesthetic veto"16/ over the creation or alteration of a work, the results would be catastrophic.

This lack of predictability would make it extremely difficult for copyrighted works to be made available to primary markets, as well as to ancillary markets that are often made possible by technological advances. For example:

* Magazine and newspaper publishers would never be certain whether their efforts to meet tight deadlines would be

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16/ Visual Artists Rights Act Hearing, supra note 2, Statement of Robert A. Gorman 3-4 (unpublished manuscript).

jeopardized by objections raised by their writers, photographers, or other contributors. Last-minute negotiations over editorial changes to a freelancer's contribution or over the cropping or placement of a photographer's work could become commonplace.17/

In addition, the ability of magazine and newspaper publishers to adapt their works so they can be distributed via new, exciting technologies may well be stymied. Objections could be raised by freelancers and other contributors about the reformatting that is necessary to adapt works for dissemination by electronic distributors.18/

17/ For example, a freelance journalist could object to the placement next to his or her story of an advertisement of a product that he or she finds objectionable. Thus, such individuals would be in the position to use their "aesthetic veto" power to censor the manner in which the newspaper or magazine is formatted.

18/ The importance of electronic distribution to newspapers and magazines was underscored by a recent story in the Washington Post that discussed the 100th anniversary of the Wall Street Journal. In this story, former columnist Vermont Royster stated, "The Wall Street Journal's biggest competitor is not the New York Times or the Washington Post, but its own computerized information service. If you have a computer and plug into the Dow Jones News/Retrieval service, you almost don't need the Wall Street Journal." "The Ups and Down of the Journal: On Wall Street an American Institution Celebrates its Centennial," Washington Post, June 23, 1989, at F1.

* Motion picture producers would not know whether they could adapt their product to meet the differing requirements of various markets. Would they be permitted to use their judgment to adapt a film made for the "big screen" so that it fits on the smaller home TV screen?19/

* Broadcasters would face uncertainty over whether their efforts to (1) edit motion pictures and other programming to accommodate commercials and (2) meet both federal and self-imposed standards governing broadcast content would be impeded, and whether their original news and entertainment programs would be subject to objections from reporters, camera persons and other contributors.

* Publishers of educational, instructional and reference books, all of which are generally intensely

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19/ Film Integrity Act of 1987: Hearing on H.R. 2400 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 2nd Sess. 127 (1988). In his testimony, producer David Brown points out that moral rights legislation would also call into question dubbing or subtitling films to make them marketable both here and abroad; adapting films to take advantage of new video formats (e.g., S-VHS and laser disc) that improve the quality of home viewing enjoyment; and alterations necessary to meet the many and varied requirements of foreign markets, each of which often imposes its own censorship laws.

collaborative works,[20] would be especially vulnerable to the invocation of moral rights. For example, textbooks publishers may well find themselves hampered in efforts to (1) update textbooks to reflect new developments in science, math and other disciplines, and (2) make their works available through new media such as computer software and interactive computer databases.

* Similarly, the producers of audiovisual works for the educational and training marketplace, an industry characterized by small businesses, would be greatly disadvantaged by moral rights legislation. These businesses would be hard pressed to continue to make their collaborative works available in all available formats, including slides, filmstrips, motion pictures, videocassettes, CD-ROMS, and technologies yet to be discovered.

* The continued success of the computer software business, another highly collaborative industry, could well be frustrated by assertions of moral rights claims by members of teams that often work together to develop computer programs. For example, it is often necessary for computer programs to be

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20/ The typical encyclopedia is comprised of contributions from literally thousands of experts in various fields.

revised because these programs (1) often contain "bugs" when they are first distributed;[21] (2) are routinely updated to reflect technological changes; and (3) are frequently customized to meet the distinct needs of a particular customer. Thus, the copyright owner's ability to make changes in his property on an on-going basis -- free of moral rights objections -- is of enormous importance in this industry.

Third, copyright owners and users would be perpetually and legitimately worried that even their most routine actions would subject them to lawsuits. Given both the subjective nature of moral rights (injury to an individual's honor or reputation) and our society's penchant for the courthouse, such concerns would inhibit copyright proprietors and users alike. Repeatedly, owners and users would be faced with a Hobson's choice: either run the risk of missing a deadline or foregoing a marketing opportunity, or face the possibility of a time-consuming, expensive lawsuit.[22]

21/ J. E. Brown, supra note 2, at 6-7.

22/ Concerns of owners and users would not be limited to assertions of the right of integrity. The right of paternity will also enable contributors to file suit if their demands for "authorship" are not accepted, no matter how justified the reasons given by the copyright owner or user. It may be impracticable to give credit in particular situations. For example, a radio broadcaster who determines that it is impossible to name every

(Footnote continued on next page)

Fourth, because many of our copyright-intensive industries involve substantial investments and entail great risks, the uncertainty triggered by moral rights would seriously inhibit the ability of these industries to attract potential investors. Fears about possible litigation or the inability of copyright owners to adapt their works to meet the demands of new markets may well convince investors to go elsewhere.

The U.S. motion picture industry is a prime example of a high-risk, high-cost business that would be particularly vulnerable in this regard. Because of the great odds against a motion picture ever recouping its enormous costs, it is imperative that film producers have the unencumbered freedom to adapt their productions to the differing needs of various markets. Without this freedom, the attractiveness of the motion picture as an investment property would certainly diminish.23/

22/ (Footnote continued from previous page)
performer, composer, lyricist, and arranger involved in a musical recording could be sued for his or her decision. Or, it may simply be impossible for the copyright owner or user to identify the contributor, as when a newspaper or magazine obtains a photograph from a stock-house and is unable to provide the identity of the photographer. See, e.g., The Berne Convention: Hearings on S. 1301 and S. 1971 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 100th Cong., 2nd Sess. 398 (1988).

23/ Technological Alterations (Appendix I), supra note 14, at 124. The preparation of reference and instructional books
(Footnote continued on next page)

Fifth, moral rights legislation would put federal judges in the position of making aesthetic judgments about the quality of creative works. Such decisions belong to the public, not to federal jurists. Although judges are trained in interpreting the law, they are ill-equipped to make such substantive judgments as whether a contributor's honor or reputation is violated by (1) the revision by a newspaper editor of a freelancer's contribution so that the piece meets the paper's standards and space limitations; (2) the adaptation of a book so that it can be distributed as an audio-book; or (3) the adaptation of an educational audiovisual work so that it can be made available on videocassette.24/ As Justice Oliver Wendell Holmes stated almost a century ago:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.... Yet if they [pictorial illustrations] command the interest of any public, they have a commercial value....It would be bold to say

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23/ (Footnote continued from previous page) is also a high-cost enterprise. For example, the fifteenth edition of the Encyclopaedia Brittanica took 10 to 12 years to complete, contained 43 million words, involved contributions from more than 5,000 contributors worldwide, and cost $32 million to complete. Definition of Work Made For Hire in the Copyright Act of 1976: Hearing on S. 2044 Before the Senate Comm. on the Judiciary, 97th Cong., 2nd Sess. 51 (1982).

24/ Visual Artists Rights Act Hearing, supra note 2, Statement of Senator Orrin Hatch at 2 (unpublished manuscript).

> that they have not an aesthetic and educational value, and the taste of any public is not to be treated with contempt.25/

Sixth, the incorporation of moral rights would adversely affect key parts of the 1976 Copyright Act.

* Work-for-hire. Moral rights legislation will stand the work-for-hire doctrine on its head. As discussed above, works produced by many U.S. copyright industries are collaborative works, in which the copyright owner often blends his or her own creative contribution with those of various individuals, including "work-for-hire" employees and "work-for-hire" freelancers, who all contribute to the overall creative effort.

The U.S. work-for-hire doctrine recognizes that (1) in such collaborative settings, in the absence of a single, identifiable owner, it will often be extremely difficult, if not impossible, for these works to be disseminated to the public, and therefore (2) fulfillment of the constitutional goal of copyright of ensuring public availability can best be achieved by centralizing copyright ownership in the entity that takes the

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25/ Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-252 (1903).

financial risk and is in the best position to exploit the work.26/ In direct conflict, however, the right of integrity would permit each and every one of these contributing individuals to sue the copyright owner, claiming that a particular use or adaptation of a copyrighted work injures his or her honor or reputation.27/

* Fair use. Moral rights proposals are also at odds with the important principle of fair use. This doctrine permits, consistent with statutory guidelines, the use of excerpts -- without the permission of the copyright owner -- from books, magazines, motion pictures and other copyrighted works for a variety of purposes, including criticism, news reporting, and research. The fair use doctrine has strong First Amendment underpinnings; it "offers a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern."28/

26/ See House Comm. on the Judiciary, 88th Cong. 1st. Sess., Copyright Law Revision, Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 358-59 (Comm. Print 1963) (comments received from the Motion Picture Association of America, March 2, 1962).

27/ See, e.g., H.R. 2400, 100th Cong., 1st Sess. § 2 (1987).

28/ Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977).

Under a statutory moral rights approach, however, those who exercise their statutory rights to make fair use of copyrighted works may well be sued by those objecting to such use.

Seventh, importation of moral rights into this country would be at odds with our nation's basic commitment to freedom of contract.

Traditionally, as noted above, business relationships are freely negotiated, agreed to, and then memorialized in binding contracts, all in the marketplace. Under a moral rights system, however, the value of contracts regarding copyright works would be vastly undercut. These agreements would, in effect, carry a big asterisk on the front page, signifying that in addition to the rights and obligations set forth in the document, various individuals have a federal statutory right to interject themselves into the implementation of the business relationship between the contracting parties.

Particularly offensive to our tradition of freedom of contract would be adoption of moral rights legislation that renders these rights non-waivable. Express non-waiver provisions strictly construed by federal judges would play havoc with the flexibility of today's marketplace.

Eighth, moral rights would retard the development of new technologies which serve emerging public needs and desires.

In the last decade alone, the public has benefitted from technological changes that have revolutionized its access to copyrighted works. Home video devices have made an incredible array of films available to consumers. Compact disc players have allowed Americans to enjoy concert-quality musical reproductions in their homes. On-line systems have brought a vast array of information from myriad sources into thousands of homes and offices at the touch of a keyboard.

Yet these and other developments might have been severely hampered had moral rights legislation been in place and permitted individuals to frustrate efforts of copyright owners to adapt works to fit new technologies. Similarly, the full potential of future technological breakthroughs, such as High-Definition Television, may never be realized if moral rights laws are adopted.

Mr. Chairman, I would like to make a final point on the moral rights issue before turning to a brief discussion of S. 1253.

Throughout this debate, much emphasis will be placed by proponents on the impact of moral rights in foreign countries, particularly France. Advocates will assert that moral rights have worked well abroad and that, therefore, they will work well in this country.

But, Mr. Chairman, this emphasis on the foreign moral rights experience begs the real question before Congress. The real issue is not how well moral rights have functioned abroad -- a matter of substantial dispute -- but rather how the incorporation of foreign-bred moral rights will fare in the United States, given our own unique legal, political, and economic systems and business practices. We are confident that once you and your colleagues have studied this issue you will conclude that moral rights are antithetical to our own economically-based, highly successful copyright system.

Mr. Chairman, as noted above, the American public benefits from a cornucopia of copyrightable works. These works are made available to the public through a multitude of diverse outlets -- magazines, television and radio stations, cable networks, newspapers, and others -- that is unmatched anywhere else in the world. Today, there is a delicate, productive symbiotic relationship between the producers of these works and those who disseminate them to the public. The system is

designed to satisfy the public's thirst for information and entertainment, and it is working.

We are fearful that the introduction into our system of moral rights concepts that are alien to us would upset the existing balances and greatly complicate matters by injecting enormous uncertainties into the marketplace. Ultimately, we believe that such legislation would impede both the creation of copyrightable works and their availability to consumers.

II. Work-Made-For-Hire

Mr. Chairman, CACC strongly opposes S. 1253. Let me explain why.

The issue of "work made for hire" -- its scope, definition and treatment -- was a "difficult and hotly contested issue"[29/] prior to enactment of the 1976 Copyright Act. The definition of work-made-for-hire "represents a carefully worked out compromise aimed at balancing legitimate interests on both

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29/ The Register of Copyrights for the Use of House Comm. on the Judiciary, 89th Cong., 1st Sess., Copyright Law Revision Part 6: Supplementary Report on the General Revision of the U.S. Copyright Law 66 (Comm. Print 1965).

sides."30/ Under this definition, a work qualifies as a work-for-hire if it is (1) prepared by an employee within the scope of his or her employment, or (2) a specially commissioned and ordered work that falls within one of nine enumerated categories and the parties agree in writing to its treatment as a work-for-hire.31/ If a work satisfies one of these tests, it is a work-for-hire, and the employer or commissioning party is considered the author of the work for all copyright law purposes.

Congressional adoption of this definition of work-for-hire marked a major break with the "employer-oriented"

30/ Id. See also H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 121 (1976).

31/ In pertinent part, Section 101 of the Copyright Act of 1976 [hereinafter Copyright Act] reads as follows:

> A work made for hire is -
>
> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

case law[32/] that had evolved under the 1909 Copyright Act. Thus, the 1976 Act was a significant change in favor of contributors. By 1976, under certain 1909 Act cases, employers who hired employees or independent contractors were presumed to be the copyright owners, unless a written agreement existed stating that the work was not to be treated as a work-for-hire.[33/] In contrast, under the 1976 Act, copyrightable works of independent contractors can qualify as works-for-hire only if the parties agree in writing that the work should be one for hire and, even then, the work must fall within one of the nine categories specified in 101(2).[34/]

In June of this year, the United States Supreme Court, in Community for Creative Non-Violence v. Reid,[35/] rendered its first major interpretation of the work-for-hire definition in the 1976 Act.

In CCNV, the Court resolved a controversy over the scope of the work-for-hire definition. Prior to CCNV, lower

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32/ Dumas v. Gommerman, 865 F.2d 1093, 1096-1097 (9th Cir. 1989).

33/ May v. Morganelli-Heumann & Assoc., 618 F.2d 1363, 1368-1369 (9th Cir. 1980).

34/ Copyright Act, supra note 31.

35/ 109 S. Ct. 2166 (1989).

federal courts had split over (a) what constitutes an employee under Section 101(1), and (b) whether commissioned works can qualify as a work-for-hire under Section 101(1), or whether commissioned works can only attain work-for-hire status if they satisfy the requirements of Section 101(2).36/

Contributors contended that, under the 1976 Act, independent contractors could never be employees under Section 101(1), and they roundly criticized those courts that ruled that commissioned works could qualify under Section 101(1) if the commissioning party supervised or controlled, or had the right to supervise and control, the work of the contributor. In CCNV, a unanimous Supreme Court agreed, thus bestowing upon contributors a "landmark" victory.37/

In CCNV, the Court expressly rejected the supervision and control test. Instead, the Court ruled that in determining whether a work is created by an "employee or by an independent contractor," courts should apply principles of the well-known and widely used common law of agency -- principles with which federal courts are quite familiar. In part, the court rejected

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36/ For a brief description of the various tests adopted by lower federal courts prior to CCNV, see CCNV, Id.

37/ Legal Times, June 12, 1989, at 12.

the supervision and control test because it turns on facts that are not known until the assigned work is completed and thus impedes the "paramount" congressional goal of enhancing predictability and certainty.38/ By adopting the agency law standard, the Court acknowledged that this test is sufficient to meet this congressional goal. Thus, only agency law employees, not independent contractors, fall under 101(1).39/

The Court also concluded that Congress drew a bright, statutory line between works created within the scope of one's employment and commissioned works. Thus, under CCNV, commissioned works can qualify as works-for-hire only if they fall within one of the enumerated categories, and the parties enter into a written agreement acknowledging their intent to treat them as works-for-hire.

However, in the course of its opinion, the Court unanimously rejected the suggestion that the term "employees" in

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38/ CCNV, supra note 35, 2173-2174. In fact, the Court acknowledged that "Congress' paramount goal in revising the 1976 [Copyright] Act [was] enhancing predictability and certainty of copyright ownership." Id. at 2177.

39/ The Court noted that "Congress' intent to incorporate the agency law definition is suggested by 101(1)'s use of the term, 'scope of employment,' a widely used term of art in agency law." Id. at 2172.

Section 101(1) should be narrowly interpreted to include only formal, salaried employees.40/

Employers and commissioning parties are now assessing the impact of the CCNV decision. For some, the decision may have only a modest impact on their business activities. For others, CCNV may well seriously disrupt settled business practices that have enabled them to create and disseminate copyrighted works. It is simply too soon at this point to gauge accurately how serious the problems will be under CCNV.

However, while the overall effect of CCNV may be unclear at this time, it is not difficult to grasp the adverse impact of S. 1253, which goes beyond CCNV to upset the balance struck by Congress between employers and commissioning parties on the one hand, and "employees" and independent contractors on the other.

If enacted, S. 1253 would have serious implications for all of these parties. Contrary to what proponents of S. 1253 may say, this legislation does not make minor, housekeeping changes to the Copyright Act. It is much more than a mere clarification of the Supreme Court's decision in CCNV. The bill

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40/ Id. at 2174 n.8.

rejects the way the CCNV case resolves one key question, and reaches out to resolve others never even addressed in CCNV. Particularly troubling are the requirements that (a) only "a formal, salaried employee" can make a work-for-hire within the scope of employment; (b) that both work-for-hire agreements under 101(2) and certain joint work agreements must be signed prior to commencement of the work; and (c) that there must be a separate written work-for-hire agreement for each work under 101(2).

At this time I will discuss two points that deserve special mention.

A. If Enacted, This Legislation Would Compel American Copyright Industries To Operate Under Rigid, Inflexible, Formalistic Rules In Lieu Of The Flexible Ones Now In Place.

One of the hallmarks of the current work-for-hire provisions is its flexibility. Under existing law, contributors and commissioning parties are free to enter into work-for-hire agreements that cover a single project or a number of projects. Moreover, because the work-for-hire provisions place no restrictions upon the types of financial arrangements that the parties may enter into, today contributors are compensated through one-time payments, advances, royalties and various other arrangements.

Furthermore, current law enhances public access to creative works. It allows the producers and publishers of collaborative works, such as educational and training audiovisual works, educational books and materials, and motion pictures, the freedom to meld together the efforts of work-for-hire employees and freelancers in ways that (1) take into account the special nature of these particular industries, and (2) are calculated to take full advantage of the opportunities made possible by technological change.

S. 1253 would undercut this flexibility. It would replace the malleability in the current law with rigid, inflexible rules that ignore the realities of the business world and the marketplace.

For example, S. 1253 would revise the definition of employees under Section 101(1) so that it reaches only formal, salaried employees -- a standard unanimously rejected by the Supreme Court in CCNV. By adopting this strict, inflexible criteria, the legislation fails to take into account the various employee/employer relationships that have become commonplace in today's marketplace and which may well satisfy the less rigid,

but familiar, "agency law" test just adopted by the Supreme Court.41/

In addition, S. 1253 reaches far beyond CCNV and makes detrimental changes to Section 101(2). S. 1253 would require, for example, that a separate work-for-hire written agreement be entered into "with respect to each such [specially ordered or commissioned] work." This requirement will be an administrative nightmare for many copyright industries that produce highly collaborative works.

For example, today the publishers of an elementary school textbook series can negotiate work-for-hire agreements with each of the various contributing parties to the series. Such series may contain dozens and sometimes hundreds of components which are revised every two or three years. It is permissible under current law for work-for-hire agreements to

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41/ In today's computer-oriented society, for example, it is increasingly common for employees to work out of their homes and to communicate electronically with their employers. In some cases, employees work full-time, but split their workday between two employers. Sometimes individuals work in an employer-supplied office on a full-time basis, but operate on a commission, rather than a salary basis. Such individuals may well qualify as employees under the agency test endorsed by CCNV and thus be considered employees for most legal purposes. But, if the overly-formalistic standard contained in S. 1253 became law, it appears that these individuals may not be treated as employees for purpose of copyright law.

cover not only the original contribution made by a particular freelancer, but to also encompass any subsequent contributions that the freelancer might make to the textbook series when it is periodically revised. If, however, S. 1253 is enacted, it appears that the publisher would have to obtain from each original contributor asked to participate in the revision a separate work-for-hire agreement.

Similarly, enactment of S. 1253 would make it difficult for educational publishers to meet the demands of the state adoption process -- the process by which state school boards review textbooks for use in their educational institutions and thus control access to state markets. It is common for a state to adopt a reading program produced by a publisher, but to condition its acceptance on the publisher making revisions or additions to the program to meet the special needs of that particular state.12/ Under current law, the publisher is free to seek from each contributor to the program a single work-for-hire agreement that allows him to call upon the original contributors to revise their contributions to make the

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12/ In an industry that typically yields slim profit margins, the role of the adoption process is of great importance to educational publishers. "Twenty-two states rely on the 'adoption' process...[and] [s]ales in these states account for 48 percent of the market." A Report of the Register of Copyrights, Copyright Liability of States and the Eleventh Amendment 11 (June 1988).

changes desired by the state -- changes that were unknown at the time the original work-for-hire agreement was signed. Under S. 1253, however, it appears that it would be necessary for the publisher to obtain a separate work-for-hire agreement from these individuals to cover their contributions to the "customized version."

S. 1253 would also eliminate the multiple work agreements that are popular in some copyright-related industries. Generally, under these agreements the contributor contracts to provide the commissioning party with a set number of works over a prescribed period of time. Thus, under S. 1253, courts would regularly be called upon to resolve disputes over what constitutes a separate work, requiring its own written agreement. For example, what is the result when a freelancer contributes a number of items to a single overall project, such as separate columns for a newspaper or different pieces of artwork for a magazine?

S. 1253 would also require that Clause 2 work-for-hire agreements be signed <u>prior</u> to commencement of the work. This provision assumes that it can be routinely determined at what point work on a project actually begins. But there is simply no way to determine when work actually commences. Does work actually begin when the parties first discuss the project, even

though formal acceptance does not occur until sometime later? What if, in the initial meeting, the parties engage in detailed discussions about the scope and terms of the project? What if a contributor, intrigued by a commissioning party's idea, begins sketches or notes for the project before an agreement is reduced to writing? Litigation is certain to ensue over the meaning of this ambiguous language.

A requirement for a prior written agreement would be extremely burdensome, if not impossible in time-sensitive industries. For example, how can a national TV news network be expected to stop its coverage of a fast-breaking news story so that an agreement can be drawn up with a stringer contributing live video footage and commentary? To compel networks to do that would seriously inhibit their ability to keep the public informed on a timely basis. And, it is important to remember that the penalty for guessing wrong about when a work commences means that the contribution cannot qualify as a work-for-hire under subsection 101(2).

In addition, the requirement of a prior written agreement is at odds with traditional business practices in the motion picture and television production industry. It is extremely common for writers to begin work on a feature motion picture before their agreement with a studio is reduced to

writing. Tight deadlines often dictate that the writer begin work while his agent and the studio iron out the details of the contract, a process that can sometimes take several months.

Also objectionable is the requirement contained in S. 1253 that, in the case of specially ordered or commissioned works, "no such works shall be considered a joint work unless the parties have expressly agreed in a written instrument, signed by them before the commencement of the work, that the work shall be considered a joint work." This provision would have the unfair effect of denying joint authorship status to a commissioning party irrespective of both the intent of the parties and the extent of the commissioning party's original contribution to the project.43/

43/ For example, in CCNV, the district court described in detail the extent to which the commissioning party contributed to the project and concluded "it is indisputable on this record that plaintiff CCNV [commissioning party] was the motivating factor in the procreation of 'Third World America' [commissioned sculpture]." The district court also noted the absence of any written agreement between the parties. Community for Creative Non-Violence v. Reid, 652 F. Supp. 1453, 1456-57 (D.D.C. 1987). On appeal, the Court of Appeals, in its discussion of the joint work issue, referred to the record compiled to date by the district court, and indicated that CCNV might well have a strong claim to joint authorship of the sculpture. Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1497-99 (D.C. Cir. 1988). (The Court of Appeals remanded the case to the district court for a determination of whether the sculpture constituted a joint work. Subsequently, the Supreme Court affirmed the Court

(Footnote continued on next page)

It is no answer that this provision will permit each contributor to retain the separate copyright in his or her own contribution. Copyright ownership in the individual contribution would be of limited benefit when that contribution is intended to be part of the combined work, and thus has little or no value standing alone. Additionally, the existing joint work language promotes public access to creative works because it permits each joint author to independently use or license the entire work, subject only to an accounting to the other co-owners for any profits garnered. However, in those cases where S. 1253 precludes a finding of a joint work, and the parties do not agree to disseminate their joint effort, it appears that public access to the combined work would be denied.

B. S. 1253 Proceeds On The Faulty Premise That Its Changes In The Work-For-Hire Provisions Would Benefit All Contributors.

That is just not true. If enacted, S. 1253 would prohibit long-standing practices that are beneficial and desired by contributors and employer/commissioning parties alike.

43/ (Footnote continued from previous page) of Appeals' ruling on the work-for-hire issue. The case is now on remand to the District Court for a resolution of the joint work question.) CCNV, supra note 35, at 2180.

For example, as previously mentioned, S. 1253 would eliminate "multiple work" work-for-hire agreements. But these agreements are desired by many contributors and employers and are common, for example, in the motion picture business where writers and other contributors are often hired for multiple picture deals. In effect, this provision would inhibit the freelancers' freedom to contract.

In addition, S. 1253 would have an adverse impact on the flexibility that freelancers enjoy today to work for a variety of employers.

Today many freelancers want the opportunity to deal with multiple employers. They do not want to be locked into a single, full-time employment situation. For example, leading experts in the educational field are often affiliated with educational institutions. It is this affiliation that makes their contributions valuable to publishers. They do not want to become full-time employees, and could not do so without relinquishing the affiliation, and its attendant exposure to the academic environment, that makes their contributions so valuable to publishers.

However, under S. 1253, employers who today utilize the first prong of the statutory definition would only be able to do

so if they hire employees on a formal, salaried basis. At the same time, because of the proposed changes to Section 101(2), commissioning parties would be limited in their ability to obtain written work-for-hire agreements. Accordingly, these commissioning parties may be forced to also rely on "formal, salaried employees" under Section 101(1).

Moreover, these proposed changes may mean fewer opportunities for freelancers because many businesses, particularly smaller ones lack the resources to hire as formal, salaried employees all of the freelancers they previously retained. Even larger entities, including educational publishers, would be hard pressed or simply unable to employ full-time the many contributors to their works.44/ The unfortunate result would be a reduction in opportunities for a wide variety of creative input.

All in all, Mr. Chairman, S. 1253 would inject great uncertainty in the marketplace. It is just not reasonable to assume that businesses will go on making the enormous investments necessary to create and disseminate copyrighted

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44/ For example, frequently hundreds, sometimes thousands of freelancers, including writers, editors, copy editors, artists, photographers and consultants, contribute to an educational series. Definition of Work Made For Hire, supra note 23, at 121.

works if the flexibility that characterizes today's marketplace is infected by the type of uncertainty inherent in S. 1253.

Conclusion

Mr. Chairman, by providing economic incentives for authors and creators, the American copyright system promotes flexibility and certainty in the marketplace. It successfully achieves the constitutional goal of promoting the production and dissemination of creative works.

Moral rights legislation and S. 1253 are at odds with this goal. Such legislation can only constrict the availability of copyrighted works. That is not a goal that Congress should endorse. CACC urges Congress to vigorously oppose such proposals.

Thank you.

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ATTACHMENT A

September 20, 1989

The Members of the Committee for America's Copyright Community include:

Association of American Publishers

Association of Independent Television Stations, Inc.

The Dun & Bradstreet Corporation

Harcourt Brace Jovanovich, Inc.

International Communications Industries Association

Information Industry Association

McGraw-Hill, Inc.

Magazine Publishers of America

Motion Picture Association of America

National Association of Broadcasters

National Newspaper Association

Omni Publications International Ltd.

The Reader's Digest Association Inc.

Recording Industry Association of America

Time Inc.

Times Mirror

Training Media Association

Turner Broadcasting System, Inc.

Warner Communications Inc.

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SUPPLEMENTAL STATEMENT OF THE

COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY

TO SEPTEMBER 20, 1989 HEARING BEFORE

THE SENATE JUDICIARY SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

101st CONGRESS, FIRST SESSION

COMMITTEE FOR AMERICA'S COPYRIGHT COMMUNITY

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Mr. Chairman, the Committee for America's Copyright Community (CACC) welcomes the opportunity to supplement its presentation made before your Subcommittee on September 20, 1989.

I. THE WORK-MADE-FOR-HIRE DOCTRINE

Before responding to some of the assertions made at the hearing by proponents of S. 1253, CACC will first make a number of points about the work-made-for-hire doctrine that time did not permit us to set forth at the September 20 hearing.

A. The Work-Made-For-Hire Doctrine Has Been An Integral Part Of U.S. Copyright Law For Nearly A Century.

The work-made-for-hire doctrine was expressly provided for in the 1909 Act, and was continued in a revised form 67 years later when Congress enacted the Copyright Act of 1976. Significantly, in 1976 Congress acknowledged that the new Copyright Act "adopts one of the basic principles of the present [1909] law: that in the case of works made for hire the

employer is considered the author of the work... ."1/

B. The Recrafted Work-Made-For-Hire Doctrine In The 1976 Act Represents "A Carefully Worked Out Compromise Aimed At Balancing Legitimate Interests On Both Sides."2/

The scope and importance of this compromise is best understood by considering what Congress did and did not do in 1976 when it passed the Copyright Act. This exercise helps to put the current debate over the work-made-for-hire doctrine in its proper perspective.

In 1976, Congress provided that a work qualifies as a work-made-for-hire only if it is (1) prepared by an employee within the scope of his or her employment, or (2) a specially commissioned or ordered work that falls within one of nine enumerated categories and the parties agree in writing to its treatment as a work-made-for-hire. Only when a work satisfies one of these tests is the employer or commissioning party deemed the author and initial copyright owner of the work.

1/ H. R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976), reprinted in 4 Melville B. Nimmer, Nimmer on Copyright at 4-89 app. (26th ed. 1989).

2/ The Register of Copyrights for the Use of the House Comm. on the Judiciary, 89th Cong., 1st Sess., Copyright Law Revision Part 6: Supplementary Report on the General Revision of the U.S. Copyright Law 66 (Comm. Print 1965).

This revised definition dramatically narrowed the circumstances under which commissioned works could be treated as works-made-for-hire. By 1976, caselaw under the 1909 Copyright Act generally held that employers and commissioning parties who hired employees or independent contractors to produce creative works were presumed to be the copyright owners, unless a written agreement existed stating that the work was not be treated as a work-made-for-hire.3/

Further, Congress:

- o Decided that even in a work-made-for-hire situation the contributor may gain control of some or all of the various exclusive rights available under the Act through a written agreement with the employer or commissioning party.4/

3/ May v. Morganelli-Heumann & Assoc., 618 F. 2d 1363, 1368-1369 (9th Cir. 1980).

4/ This means that "the employer and employee [as well as the commissioning party and freelancer] could agree to any disposition between them of the exclusive rights under the copyright, but it would not allow them to change the status of a 'work made for hire' under the statute." Register of Copyrights Supplementary Report, supra note 2, at 68.

- Adopted the current provision with its nine categories and written agreement requirement after the interested parties concluded that these works are ordinarily "prepared by freelance authors at the instance, direction, and risk of a publisher or producer... ."5/

- Recognized that the type of collaborative works covered under clause two of the definition come into being solely because they are specifically requested to fill a particular need by a commissioning party who has the financial wherewithal to meld together the numerous contributions and to disseminate the final product to the public.

- Codified the historic compromise in which employers/commissioning parties agreed to termination, after 35 years, of copyright transfers -- other than works created pursuant to work-made-for-hire -- in specific exchange for the designation of certain specially ordered or commissioned works

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5/ Id. at 67.

as works-made-for-hire if the parties expressly agree in writing.6/

At the same time that Congress adopted the compromise that narrowed the reach of the work-made-for- hire doctrine, it also considered and rejected a proposal that would have granted employers and commissioning parties limited copyright protection, which would have fallen well short of the copyright owner status that they are now accorded.7/

C. Today Work-Made-For-Hire Is An Indispensable Tool In Many Copyright-Intensive Industries That Produce Collaborative Works Where Dozens, Hundreds, And Sometimes Thousands Of Individuals Contribute To An Overall Project.

For highly collaborative works, it is imperative that there be a single, identifiable entity with the resources necessary not only to create the work and disseminate it to the public through traditional means, but to take full advantage of the opportunities for enhanced public access to creative works made possible by technological change. The work-made-for-hire doctrine permits a single entity to acquire the rights necessary to fulfill these goals.

6/ See Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166, 2175-2176 (1989).

7/ H. R. Rep. No. 1476, supra note 1, at 121.

A striking example of the importance of work-made-for-hire in various collaborative settings is found in the educational publishing industry.8/ Typically, the preparation of a new instructional program (e.g., mathematics, language arts, science) is a highly complex and costly effort that involves:

- "[H]undreds of individuals, including in-house editors, book designers and production managers; freelance teacher-consultants, writers, illustrators, map makers, editors, copy editors, and indexers";9/

- Not only a pupil textbook, but a variety of other items essential to the series, including: (1) a teacher's edition of the textbook; (2) a pupil's workbook; (3) teacher's edition of a pupil's workbook; (4) testing materials; (5) a teacher's

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8/ A particularly illuminating discussion of the importance of work-made-for-hire in educational publishing is set out in Definition of Work Made For Hire in the Copyright Act of 1976: Hearing on S. 2044 before the Committee on the Judiciary of the United States Senate, 97th Cong., 2d Sess. 114-122 (1982) (Statement of Bella Linden, Esq., on behalf of Harcourt Brace Jovanovich, Inc.).

9/ Id. at 116-117.

resource book (6) accompanying software; and (7) filmstrips; and

- Periodic revisions of the various components of the instructional series, generally every three to five years. These revisions are necessary, in part, to update the material to include references to new technologies, mathematical or other developments, or intervening historical events and to reflect advancements in learning theories.10/

In such an intensely collaborative setting, it is the responsibility of the publisher who conceives the idea for the series, finances the project, and assumes the risk to meld together the various contributions into a coherent and comprehensive final product, and to revise it as appropriate. The publisher must be assured that he has the necessary rights from all of the various contributors so that he can go about the daunting task of preparing,11/disseminating, and later revising

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10/ Id. at 116.

11/ Consider for example, the preparation of a textbook chapter designed to teach reading comprehension. Typically, the textbook will be accompanied by a variety of items including a teacher's guide, classroom instructional guide, student study guide, workbook, test questions, and audio visual aides. The lessons within this chapter will be illustrated by one story. Throughout each textbook component, the story appears in its

(Footnote continued on next page)

the series. Work-made-for-hire is designed to ensure that the publisher has that level of assurance. That necessary assurance would be lacking if work-made-for-hire were unavailable and each contributor were deemed to be an author of the work.

In such an environment, transfers of copyright are an inadequate substitute for work-made-for-hire. Instructional series, or parts thereof, as well as encyclopedias, reference books, and other collaborative works often have value and public appeal that extends beyond the 35-40 year termination period. The specter of the various contributors to the overall project, or their heirs, opting to terminate a copyright transfer would wreak havoc in these industries. It would mean that an educational publisher could be faced with the prospect of having to isolate the hundreds of original contributions to the overall work, an "insuperable problem,"12/ because these contributions have been changed and edited so many times that they are often

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11/ (Footnote continued from previous page) entirety, one paragraph at a time, one sentence at a time. It also appears in modified forms, with words and sentences jumbled or rearranged. These manipulations of the story are necessary to teach the reading comprehension lessons. It is therefore necessary that the publisher have control over the rights to the story. The publisher will negotiate with the creator for a work-made-for-hire agreement covering multiple works, which will allow the publisher to use the story, in whatever form needed, in any or all of the textbook components.

12/ Definition of Work Made For Hire, supra note 8, at 121.

no longer identifiable. Moreover, even if a particular contribution were somehow identifiable, the deletion of a portion of an instructional series due to termination could cause an unraveling of the whole given the integrated nature of an instructional series, which may consist of dozens and sometimes hundreds of intermeshed components.

The work-made-for-hire doctrine takes on added importance in our modern age as new technologies regularly emerge that better preserve creative works and thus enhance public access to these works. Highly collaborative copyrightable materials such as scholarly and historical journals, magazines, and newspapers, which in the past gathered dust in files and on shelves, can now be input into databases and CD-ROMs. As a result of these developments and others yet to come, the "life-span" of these works is greatly expanding. At the touch of a keyboard, these materials can be brought into schools, homes, and offices.

But the promise of these technologies as a means of increasing public access to copyrighted works may well be stifled if those transferring or adapting these works do not hold the necessary rights to do so. For example, will a transferor of a copyrightable work be able to warrant that he holds the appropriate rights for the transferee to input the

material into a CD-ROM intended to have an expanded life span? Work-made-for-hire provides the assurances necessary for such transfers or adaptations to be made, greatly benefiting historians, researchers, students, and other segments of the public.

II. RESPONSE TO ASSERTIONS OF PROPONENTS OF S. 1253

During the September 20 hearing and in their written submissions, proponents of S. 1253 made a number of assertions regarding alleged work-made-for-hire abuses. In our view, these assertions paint an unfair picture of both the importance and application of this time-honored doctrine in the business world. Obviously, as is true in any business setting, controversial practices will occur at times. We submit, however, that while abuses may exist in the marketplace, they are aberrational, infrequent, and are overwhelmingly outweighed by the literally thousands of non-controversial work-made-for-hire agreements that have been used over the years and which have helped make many creative works available to the public.

Of course, insofar as certain practices do exist and constitute an abuse of the work-made-for-hire doctrine, we share the Subcommittee's resolve that they be addressed expeditiously. In this regard, CACC has alerted its members to the serious concern voiced at the hearing about the practice of treating

endorsement of a check as a written work-for-hire agreement under clause 2 of the statutory definition, where receipt of the check represents the first time that the contributor learns that the work is to be considered a work-made-for-hire.

Mr. Chairman, an individual reviewing the oral presentation and written submissions of the proponents of S. 1253 might well make a number of inaccurate and unfair assumptions about the work-made-for-hire doctrine. At this time, we will point out some of these misconceptions and put the doctrine in its proper perspective.

A. Forms Of Compensation: The Work-For-Hire Doctrine Allows For A Variety Of Financial Arrangements.

Contrary to the assertions of the proponents of S. 1253, the work-made-for-hire doctrine does not mandate that freelancers are paid only for one-time usage of their works and that they receive no further compensation, irrespective of any additional uses by the commissioning party.

Work-made-for-hire is a legal doctrine that allocates only initial copyright ownership rights between parties and nothing in the doctrine dictates the forms or terms of financial arrangements on which the parties may agree. In fact, work-made-for-hire freelancers are compensated through a variety

of payment arrangements, including hourly rates, advances, royalties, flat fees, and flat fees plus royalties.

For example, contributors to motion pictures, such as directors and screenwriters, receive ongoing residual payments under their respective guild agreements and sometimes under their own individual employment contracts as well. Similarly, royalty payments are also common in agreements governing the production of other copyrightable works, including textbooks and other instructional materials.

B. **Multiple Work Agreements: Agreements That Cover More Than A Single Project Benefit Commissioning Parties And Freelancers Alike.**

Despite the statements made by the proponents of S. 1253, "multiple-work" work-made-for-hire agreements are a valuable tool in many copyright industries. Commissioning parties, such as magazine publishers, motion picture producers, standardized test publishers, and educational publishers, and work-made-for-hire contributors often agree to a single "multiple work" agreement that covers a series of works, number of projects, multiple contributions, or revisions to a specific work or project. Such agreements are employed because they permit rationality in advance planning by commissioning parties and freelancers alike, and they also provide the contributor

with the prospect of a fixed amount of work over a specific period of time.

For example, as Mr. Kovner indicated in his written statement, it is common for a magazine publisher and freelancer to agree in a single agreement for the freelancer to contribute a number of articles within a year and to be paid separately for each individual contribution. Similarly, in the motion picture industry, producers and screenwriters and other contributors are often hired for multiple picture deals or for multiple contributions. Multiple work agreements are also important in the preparation of standardized tests. The contributors of test items and associated materials commonly contribute multiple works for use in both their original and revised forms in the same and different tests. Moreover, before a test item can be included and scored in a standardized test, the items must be pretested, modified if necessary, and pretested again. This is an arduous process. The publisher of the test must have the right to modify the test item and to publish the item in several tests. Multiple work-made-for-hire agreements are necessary for test publishers to perform these important tasks.

C. **The Right To Negotiate: Work-Made-For-Hire Contributors Can Negotiate For Control Of The Various Rights Available Under The Copyright Act.**

Despite the claims of the bill's proponents, under Section 201(b) of the Copyright Act, the contributor can gain control of some or all of the exclusive rights that initially vest in the employer/commissioning party. For example, in the motion picture industry, writers have won the right through collective bargaining to obtain certain rights regarding their literary efforts, including the right to turn the work into a play or novel.

Moreover, despite the proponents' comments to the contrary, work-made-for-hire agreements do not prevent freelancers from including works in their personal portfolios. Commissioning parties and freelancers can and do negotiate over the right to include works made under work-made-for-hire agreements in the creator's portfolio. For example, as a general rule, book publishers[13/] who utilize work-made-for-hire agreements negotiate with authors and artists for the right of creators to use the work in their portfolios, subject only to reasonable limitations such as not permitting the work to be

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13/ For example, educational publishers often supply photographers for use in their portfolios a full color copy of the page on which the photograph was used.

used in competition with the publishers' own usage. As well, magazine publishers can and do agree, during the negotiation process, to "portfolio rights" for the artists who create their covers -- rights which are clearly significant given the market value of such covers. Furthermore, as a matter of policy, some commissioning parties agree that freelancers may include such works in their portfolios, and this point is spelled out in the work-made-for-hire agreement between the commissioning party and the contributor. Thus, contrary to the impression created by the proponents of S. 1253, freelancers can and do gain control over important and commercially significant rights.

D. Market Outlets: The Proponents' Underlying Assumption That, Since 1978, There Has Been A Constriction In The Number Of Outlets With Which Freelancers Can Deal Is Simply Inaccurate.

Today there are no market barriers to the entrance of new players into such industries as the magazine business (e.g., specialty publications aimed at computer and music enthusiasts), and the number of new magazines is on the upswing.14/

14/ The number of new magazine start-ups has increased every year between 1985 and 1988. In 1985, this figure was 231; in 1988, the number more than doubled to 491. Samir Husni's Guide to New Magazines, 1989 at 16. Similarly, according to the International Standard Book Number Agency (ISBN), which is responsible for assigning ISBN numbers to new book publishers and titles, approximately 400-500 new book publishers are assigned ISBN numbers each month.

These new entrants are often small businesses and trailblazers that provide previously unavailable niches for freelancers.

While it may be true that in certain industries there may be some players that have a relatively large share of the market as defined in terms of copies, nonetheless, these markets are growing in size[15/] and they present opportunities for freelancers. For example, the fact that some sports or news magazines may have large national circulation numbers does not subtract from the fact that there are numerous regional sports publications. Just because some entities do more business than others does not mean that there is not a host of outlets of all sizes in the marketplace providing opportunities for freelancers.

15/ According to the Magazine Publishers Association, between 1978 -- the effective date of the 1976 Copyright Act -- and 1989, the number of U.S. periodicals has increased from 9,582 to 11,556, a jump of almost 21%. Similarly, Peter Simon, Vice President, R.R. Bowker, Inc., estimates that for the year 1988-89 there are 21,000 book publishers; that number is expected to grow to approximately 30,000 for the year 1989-90. Mr. Simon also points out that in 1977-78 there were only 6,000 such publishers.

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RESPONSES TO POST-HEARING QUESTIONS

A. Questions from Senator DeConcini

1. While S. 1253 may be in some sense narrower than previous legislation in this area, nevertheless it is by no means a carefully tailored approach. As explained more fully in our written statement and summarized below, the language of S. 1253 contains many ambiguities that are certain to engender litigation, and such legislation could seriously inhibit legitimate use of the work-made-for-hire doctrine.

First, S. 1253 rejects the "agency law" test unanimously adopted by the U.S. Supreme Court just four months ago. In addition, the "formal, salaried" approach to defining work-made-for-hire is virtually unknown in the U. S., adopted only by the Ninth Circuit Court of Appeals in Dumas v. Gommerman. Moreover, the specific formulation of the "formal, salaried" approach contained in S. 1253 is itself unclear, as acknowledged by Ralph Oman, Register of Copyrights in his testimony. (See page 16 of Mr. Oman's written statement.) Exactly what constitutes a "formal, salaried" employee is not set forth in the legislation. Similarly, other key phrases in the bill are vague, such as what constitutes a "separate work" or the "commencement" of such a work. All in all, the bill's lack of clarity ensures much litigation.

This lack of clarity also ensures that S. 1253 would not achieve what its proponents cite as basic goals underlying the need for its passage. S. 1253's proponents claim that a principal reason for enacting the bill is that it will resolve questions of ownership at the outset of an employment relationship and before works are created by allowing persons to predict in advance whether they are "employees" under the Copyright Act. (See page 58 of Mr. Weisgrau's written statement on behalf of the Copyright Justice Coalition and pages 16-18 of Mr. Oman's written statement.) However, according to Mr. Oman, the "formality" of an employee's status turns on the existence of an "ongoing, permanent relationship" -- a determination that can only be made in the context of the creation of a series of works, i.e., well after the employment relationship begins and after works are created. Plainly, this is not in any sense carefully tailored.

Second, as noted in detail in CACC's hearing statement (pp. 31-39), the requirement that prior to the commencement of a specially ordered or commissioned work the parties must enter into a separate written work-made-for-hire agreement is ambiguous, certain to promote litigation, highly impractical, and would unreasonably limit the ability of commissioning parties to employ work-made-for-hire agreements.

Finally, when the narrow, formal salaried approach is combined with the limitations placed on clause 2 work-made-for-hire agreements, the overall effect is likely to be a reduction in the opportunities for freelancers and the flexibility that they now enjoy. Many businesses lack the resources to hire as formal, salaried employees all of the freelancers that they now engage. The result, therefore, could well be a reduction in the opportunities for a wide variety of creative output.

2. It should be restated, at the outset, that CACC's position is that Congress should not enact legislation in the work-made-for-hire area. Rather, in the wake of the Supreme Court's decision in CCNV, Congress should at least allow the "agency" approach a chance in the marketplace. This is particularly true when the potential alternative, however defined, is certain to engender litigation and operate in an overly restrictive manner.

As noted above, the term "formal, salaried" employee has not been interpreted by any U. S. court except the Ninth Circuit. Thus, extended litigation is a virtual certainty. In contrast, the "agency" standard adopted by the Supreme Court --

itself a landmark victory for contributors -- is at least tied to familiar legal concepts that have been well explored by the courts.

3. It is true that states such as California and New York have passed "moral rights"-type statutes. However, these statutes generally are narrow in scope and do not apply to the types of activities engaged in by most U. S. copyright industries. For example, both the California and New York statutes cover only the defacement or alteration of works of "fine art." Moreover, neither statute generally applies to works prepared under contract for commercial use. Apparently, this is true regardless of whether the works are produced in a for-hire relationship. (See Nimmer on Copyright, § 8.21[C], at 8-265 - 271.) Thus, such legislation does not pose an impediment to copyright industries engaged in the regular course of business in these jurisdictions.

Nor does the fact that American copyright industries do business in "moral rights" countries support the imposition of such subjective, unpredictable, federal moral rights legislation in this country. As explained in great detail in the paper submitted at the hearing by Ambassador Veliotes,

European legislation operates in a fundamentally different context. Moral rights concepts have developed in foreign nations over many years and generally have been in place from the inception of copyright laws of these countries. These rights have been shaped over time and their adoption abroad has virtually never been the result of the sudden interjection of such subjective, amorphous rights into a long-standing, well-functioning system. That is what precisely would happen here if comprehensive moral rights legislation were adopted.

In addition, the force of stare decisis, so fundamental in our system, is not present in many European countries. This permits judges and others to adapt laws to address the equities of particular situations. Then, too, European moral rights statutes contain numerous exceptions and frequently are simply ignored.

As Congress recognized only last year, this country already offers a panoply of statutory protections that satisfy Article 6bis of the Berne Convention. These protections include provisions of the Copyright Act and the Lanham Act, various state statutes and common law principles such as libel, defamation, contract, misrepresentation and unfair competition. For Congress to enact moral rights legislation

would involve it in the extraordinarily daunting task of pre-empting these protections. Such an effort would appear, for example, to mandate pre-empting state defamation laws and replacing them with a single, federal law of defamation. This would be a truly enormous undertaking for Congress and one that would raise extremely serious questions about the appropriate relationship between Congress and its various state counterparts.

4. It is simply not appropriate to argue for moral rights legislation by citing an example involving the publication of private, personal letters. The issues raised there are entirely different from the present debate over moral rights legislation, which involves commercial works created specifically for public use and dissemination.

The Copyright Act establishes an economic framework that encourages the creation and dissemination of such works. This framework is composed of three fundamental elements. First, the Act gives copyright owners the financial incentive to devote resources and energy to producing and disseminating creative works. Second, the Act provides the predictability and certainty that business activities will be governed by the objective terms set forth in the four corners of business

arrangements. Third, the Act allows both owners and users the flexibility to devise and implement their own business arrangements to make works available to the public. That this framework has succeeded in achieving the goal of ensuring the public availability of a broad, diverse array of intellectual and artistic works is demonstrated by the vitality of U.S. copyright industries today.

This success is jeopardized by the prospect of broad moral rights legislation. Among other problems, such legislation would inject great uncertainty into the marketplace, cause copyright owners and users to worry that even routine activities could subject them to lawsuits, and seriously inhibit the ability of many of our copyright-intensive industries to attract potential investors. The experiences in countries having moral rights regimes illustrate that these are not idle warnings. As described in the paper submitted at the hearing by Ambassador Veliotes, in France an artist who had painted stage sets for an opera successfully claimed that his moral right was violated by the producer's decision to delete the scene using the sets. In Canada, the creator of a sculpture enjoined the owners of the sculpture from draping it with ribbon as part of a Christmas display. And in Italy, motion picture directors can claim successfully that the

televised showing of their films with commercial interruption violates their moral rights. Clearly, the U.S. should not jeopardize its long-standing business practices by allowing the injection of such subjective claims into a highly successful system.

5. Yes, this is a difficult question. Over 11,000 magazines are published in the United States. It is simply impossible to make generalized statements about the copyright practices of the "magazine business." Your specific questions concern the use of photographers and photographs by a "news magazine," presumably a typical weekly news magazine. Bear in mind that such magazines are representative of but one of the broad spectrum of types, sizes, and frequencies of American magazines, and a news magazine's practices concerning photographs cannot be said to be typical of the "magazine business" as a whole.

Very few of the photographs which appear in news magazines are "done by formal employees" or by "freelance photographers under work for hire agreements." A high percentage of photographs are "done by freelancers outside of such agreements," most often on a one-time use basis. A news magazine's photographs come from a variety of sources:

freelancers, wire services, newspapers, photo agencies, and stock houses. Although a news magazine's use of work-made-for-hire photography is not extensive, it is nonetheless an important tool in our industry. Normally, for example, the photography for the cover of a news magazine will be done under a work-made-for-hire agreement.

With regard to changes which may be effected by CCNV, we must await actual experience to assess accurately its impact on the magazine industry. It is simply much too soon to tell. With regard to S. 1253, we reiterate: (1) our deep concern about making any changes in the work-made-for-hire doctrine so soon after CCNV; and (2) our strong opposition to the radical changes proposed by this bill. Moreover, as stated in the response to question 1, the likely impact of S. 1253 will be a reduction in the opportunities for freelancers, as some works may move in-house, and some works may not be created at all.

6. The Copyright Office's interpretation of clause (2) of the Copyright Act's work-made-for-hire definition is strained and defies common sense. It should be apparent that the statute's reference to an agreement pertaining to "the work" is simply a reference to any particular work that might be at issue or under discussion; it hardly disqualifies an agreement

that refers to more than one work, or prevents any and all works covered by the agreement from falling within the definition of work-made-for-hire. To illustrate this fact, consider that the Act also states that a work-made-for-hire is "a work prepared by an employee within the scope of his or her employment." 17 U.S.C. § 101 (emphasis supplied). This language clearly does not preclude multiple works prepared by an employee within the scope of his or her employment from being works-made-for-hire.

The Copyright Office's reading of clause (2) of the Act's work-made-for-hire definition clearly contradicts the plain meaning of the Act. It ignores the fundamental tenet of statutory construction -- now codified -- that "unless the context indicates otherwise ... words importing the singular include and apply to several persons, parties or things." 1 U.S.C. § 1. We submit that there is no such context here and that, as a result, the singular in the statute should be read to include plural.

In other parts of the Copyright Act outside of its work-made-for-hire provisions, the singular is properly and regularly treated as connoting the plural. As only one example of many that might be given, consider the provisions governing

the transfer of the ownership of a copyright (17 U.S.C. § 201(d)(1)) and the requirement that as a general rule, such transfers must be supported by written conveyances (17 U.S.C. § 204(a)). Although § 201(d)(1) speaks in terms of the singular -- "the ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession" -- it is clear that multiple copyrights may be transferred under a single written conveyance.

A statutory ban on multiple work agreements would clearly have an adverse impact on both various copyright-related industries and the contributors that they commission pursuant to such agreements. The impact of such a statutory provision is set forth in pp. 31-33 of CACC's written hearing statement, including the ramifications of such a statutory change on the educational publishing business. Today, publishers can negotiate work-made-for-hire agreements with each of the various contributing parties to a series to cover not only each individual's original contribution, but any subsequent contributions to later revisions. Because S. 1253 appears to prohibit such efficient and popular agreements, it

would unnecessarily involve publishers in innumerable time-consuming and expensive negotiations.

Similarly, S. 1253 would eliminate the practice under which a contributor contracts to provide the commissioning party with a set number of works over a prescribed period of time. As noted in CACC's written statement, this practice is common in the motion picture and magazine industries. It serves the important purpose of permitting both the commissioning party and the contributor to engage in advance planning that is important to to the proper functioning of our copyright system.

Finally, this provision of S. 1253 is certain to engender much litigation as courts would be regularly called upon to resolve disputes over what constitutes a "separate work."

B. Questions from Senator Leahy

1. Editors and publishers often must balance sometimes conflicting responsibilities and concerns. They are faced with the task of melding together a large number and variety of contributions in a way that best conveys a story or message,

and of doing so quite often within demanding time constraints. Ultimately, however, they are responsible for overseeing their publications, and they are held accountable for the contents. In this context, editors and publishers must make tough decisions about how best to use various contributions in a manner consistent with a publication's own standards, style, and space limitations. In making these decisions, it may be necessary for an editor to crop a photograph in a way that he or she believes best complements an accompanying story.

2. We do not believe any legislative changes to the work-made-for-hire doctrine are warranted at this time, for the following reasons:

First, the practical impact of the work-made-for-hire doctrine has just been dramatically changed by the decision of the Supreme Court in CCNV v. Reid. That decision rejected the broad definition of "employee" previously adopted by most federal courts, in favor of a much narrower definition that will make work-made-for-hire inapplicable in many instances in which it was previously employed. Legislative tinkering with the balance between contributors and publishers would be particularly unwise at this time, when all interested parties are just beginning to assess the post-CCNV environment.

Second, the practices identified by proponents of S. 1253 as abuses of the work-made-for-hire system appear far narrower than the sweep of the remedies proposed in that legislation. Moreover, while abuses may occur in the work-made-for-hire field, they are isolated aberrations, not the norm, and they are overwhelmingly outweighed by the literally thousands of non-controversial work-made-for-hire agreements that have been used over the years and which have helped make many creative works available to the public. Attention to correcting isolated abuses must not obscure the fact that overall, the work-made-for-hire system functions well. It provides both contributors and publishers with sufficient flexibility to fulfill the constitutional goal of promoting the creation of innovative new works. All participants in the systems, and society as a whole, benefit from the availability of work-made-for-hire under the Copyright Act.

In sum, while the current work-made-for-hire system is not perfect, it is in no sense "broken," and certainly not to the extent of the drastic and imprudent "fix" proposed by S. 1253. Moreover, legislative change would be particularly untimely now, on the heels of the significant changes wrought by last spring's CCNV decision.

Senator DECONCINI. Thank you, Mr. Klipper.
Mr. Kovner.

STATEMENT OF VICTOR KOVNER, CHAIRMAN, LEGAL AFFAIRS COMMITTEE, MAGAZINE PUBLISHERS OF AMERICA, NEW YORK, NY

Mr. KOVNER. Mr. Chairman, I appreciate the opportunity to appear here on behalf of the Magazine Publishers of America. I do so as chairman of their legal affairs committee, and with your permission I will simply ask that my testimony be included as part of the record——

Senator DECONCINI. Without objection.

Mr. KOVNER [continuing]. And instead, I will take the opportunity to respond to some of the comments that were made by the prior panel and to some of the questions posed by you and by Senator Hatch.

First, with respect to the endorsement stamp. Those stamps on the checks are simply unenforceable as a matter of State law. To my knowledge, responsible publishers do not use them. If they do use them, they are simply ineffective. People may strike them from the back, and they may be deposited. They do not, as a matter of State contract law, create a contract. There is simply no reason to address them in the Copyright Act.

I might add, as you yourself noted, those principles apply——

Senator HATCH. Do all 50 States——

Mr. KOVNER. I can't say to a certainty, Senator, that that's true in all 50 States, but I am not aware of a single State where they are enforceable today. And I believe that their usage is extremely rare. To my knowledge, they are just not used by members of the Magazine Publishers of America, which include thousands of publications, the largest consumer publications in the country.

Second, in terms of the notion that we should bar multiwork agreements, I ask you to focus on the basic nature of contributing editors to magazine publishers today. People generally sign up for a series of articles—or perhaps a series of photographs. To require that there be a separate agreement made for each one is simply more work for lawyers, more paperwork, more burden on all parties, and the effective life of any of these agreements lasts only to the next agreement, because each assignment is going to have a separate fee applicable to it. If a writer or photographer or illustrator does not wish to render that service at that defined fee, they simply won't do so.

The entire structure that was presented, I suggest, is a misconception of the basic bargaining arrangements. Creators can offer for sale one-time rights. They can offer for sale a multiplicity of rights. They can offer for sale all rights. They can offer it on a work for hire basis, and there are different prices that will be paid. The mere fact that you use a work for hire agreement doesn't mean that there aren't going to be subsequent payments. As Mr. Klipper pointed out, indeed, there are plenty of work for hire agreements which involve sharing of income from subsequent uses. And indeed, work for hire agreements involve reassignment of a whole panoply of rights, as negotiated and defined.

The groups you heard from previously include some of the very fine trade associations, such as the American Society of Magazine Photographers, which forcefully represents the finest photographers in this country. Their members do not, as Mr. Weisgrau said, routinely sign—they very rarely sign—work for hire agreements. They usually sign very limited rights agreements. They are closely negotiated by a series of sophisticated experts. But there are instances where "work for hire" agreements are appropriate and are negotiated in the marketplace, and ought not be barred across the board.

There is less here than meets the eye. They are really troubled by being asked to grant all rights, not the work for hire agreement per se because work for hire agreements can involve a reassignment of a series of rights. The only significant issue, I submit, is the so-called termination transfer after the 35th year, which would be eliminated under a work for hire framework.

But there are uses appropriate to the magazine industry. We've seen it just recently with the commemorative publications involving the 50th anniversary of World War II where lots of creative work has been republished. If a magazine is in the position of having to renegotiate after the 35th year with the heirs of the multiplicity of creators—because many, many people contribute to these works—the public will be deprived of publications. Just as in the moral rights area which we are really not addressing, since it wasn't raised this morning, these proposals limit speech, limit the availability of information to the public rather than encourage the use of freelancers, which is a vital part of our industry.

Thank you.

[The prepared statement of Mr. Kovner and a letter to Senator DeConcini follow:]

STATEMENT OF VICTOR A. KOVNER
ON BEHALF OF THE
MAGAZINE PUBLISHERS OF AMERICA
SEPTEMBER 20, 1989

SUMMARY

MPA opposes the enactment of a uniform federal law of "moral rights" and opposes the enactment of S. 1253, the "work for hire" bill introduced by Senator Cochran.

The United States has a copyright system that works. It is a system that has served publishers, editors, creators -- and most importantly, the American public -- extremely well for two centuries. The Copyright Act of 1976 was built upon the principles of balance and compromise, and enacted only after decades of weighing and considering the interests and arguments of all sides of all issues. Those who would fundamentally alter this system or disrupt that balance bear an extraordinarily heavy burden of proof. MPA respectfully submits that neither the advocates of "moral rights" nor the proponents of Senator Cochran's "work for hire" bill can make the case for the radical changes they propose.

Moral Rights. The actions of the 100th Congress cannot accurately be construed by anyone as an explicit or implicit endorsement of the proposition that the doctrine of "moral rights" has become, or should become, part of our Copyright Act, or that the enactment of comprehensive "moral rights" legislation would serve a meritorious public purpose. Last year Congress concluded that enactment of a federal "moral rights" statute was not necessary for the United States to satisfy its obligations under Article 6 bis of the Berne Convention. This year, apparently, the question is whether Congress should enact such a statute even though our nation is under no obligation to do so. The answer, clearly, is "no." Such a statute would impede the timely dissemination of information to the public, inhibit editorial freedom, and impinge upon the freedom of contract.

Work for Hire. S. 1253's rewriting of the Copyright Act's work for hire provision is no mere "clarification." It is a radical and unwarranted revision. Apparently not satisfied by their substantial victory in CCNV v. Reid (in which the Court rejected the test of employment favored by MPA), the proponents of S. 1253 now seek the one form of relief denied them by the Court. S. 1253 would overturn the Court's reliance on the well-known principles of agency law and adopt the same "formal, salaried" test which the Court rejected. Such a test would likely prompt even more litigation. MPA also objects to the S. 1253's prohibition of multi-work agreements and S. 1253's requirement that a written agreement be executed prior to commencement of each work. These provisions serve no one's interest -- certainly not that of the reading public.

STATEMENT OF VICTOR A. KOVNER
ON BEHALF OF THE
MAGAZINE PUBLISHERS OF AMERICA

BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

SEPTEMBER 20, 1989

Mr. Chairman and Members of the Subcommittee:

My name is Victor A. Kovner. I appear here today in my capacity of Chairman of the Legal Affairs Committee of the Magazine Publishers of America (MPA).

The message which I am authorized to bring on behalf of MPA is straightforward: (1) we oppose the enactment of a uniform federal law of "moral rights"; and (2) we oppose the enactment of S. 1253, the "work for hire" bill introduced by Senator Cochran.

As you know, MPA is the trade association representing the interests of approximately 200 firms which publish more than 1000 consumer-interest magazines annually. Over the years we have been recognized as the voice of the American magazine industry on numerous issues of public policy. I am an attorney engaged in the private practice of law as a partner in the New York City firm of Lankenau, Kovner & Bickford, specializing in media law. Among the clients we regularly represent are the publishers of Rolling Stone, Us, Harper's, Lear's, 7 Days and many other members of MPA.

I will summarize our views on "moral rights" and "work for hire" in a moment, but please note at the outset that the theme of MPA's message today is essentially the same as it was during last year's debate over the Berne Convention and during the consideration of the bills introduced in past Congresses by Senator Cochran.

We have a copyright system that works. It is a system that has served publishers, editors, creators -- and most importantly, the American public -- extremely well for two centuries. The Copyright Act of 1976 was built upon the principles of balance and compromise, and enacted only after decades of weighing and considering the interests and arguments of all sides of all issues. Those who would fundamentally alter this system or disrupt that balance bear an extraordinarily heavy burden of proof.

MPA respectfully submits that neither the advocates of "moral rights" nor the proponents of Senator Cochran's "work for hire" bill can make the case for the radical changes they propose.

A. Moral Rights

As you know, MPA was an active participant in the debate over Berne adherence. Our involvement was triggered by one factor: the spectre of "moral rights" in American copyright law. MPA initially opposed U.S. adherence to the Berne Convention solely because of "moral rights." Our firm conviction was (and

remains today) that the doctrine of "moral rights", if transported into American copyright law, would greatly alter the delicate balance of rights which is the foundation of our copyright system. Only when lengthy and painstaking negotiations and deliberations conducted under your guidance produced the guarantee of moral rights "neutrality" did the magazine industry withdraw its opposition to Berne adherence.

Your wise and emphatic declaration of neutrality preserved the delicate framework of literary rights which forms the foundation of a successful industry. The actions of the 100th Congress cannot accurately be construed by anyone as an explicit or implicit endorsement of the proposition that the doctrine of "moral rights" has become, or should become, part of our Copyright Act, or that enactment of comprehensive "moral rights" legislation would serve a meritorious public purpose.

Last year Congress concluded that enactment of a federal "moral rights" statute was not necessary for the United States to satisfy its obligations under Article 6 bis of the Berne Convention. This year, apparently, the question is whether Congress should enact such a statute even though our nation is under no obligation to do so. We submit that the answer, clearly, is "no."

Mr. Chairman, our members are in the business of disseminating information to the reading public in a timely manner. The record of the Berne debate is replete with examples given to you and to your colleagues by our members and by others

of the impediments to the accomplishment of this objective which would be created by a federal "moral rights" regime.

Permit me to recall the testimony offered before this subcommittee last year by John Mack Carter, a distinguished editor with decades of experience in preparing magazines for publication. Mr. Carter gave you a "hands-on" look at the real-world implications of "moral rights" for a time-sensitive, highly collaborative industry such as ours.

> "I am not a lawyer, nor an expert on copyright or on international trade. But I am an expert on editing a magazine, and I guarantee that adoption of "moral rights" would radically alter the way American magazines have been edited for over 200 years. The ramifications are enormous.
>
> "The editor is responsible for seeing that each issue is published on time. "Moral rights" would drastically curtail the editor's freedom of action and judgment, making the meeting of this responsibility enormously difficult, if not impossible. Delays means huge losses for the magazine and its advertisers.
>
> "The editor has no choice; all materials must be ready for press time. The "closing" of an issue requires that these materials be fitted, that some articles be cut in length, or some language be added. It is the practice and custom of the American consumer magazine industry that authors are not given approval over the final editing of articles.
>
> "Authors and the magazine industry are aware that such editing takes place. It would be an unfair burden on editors and on the magazine industry to place at risk an issue of a magazine -- or to risk being thrust into litigation -- because editing changes made in an article were not approved by an author.
>
> "The process and problems with respect to photographs are similar. In the magazine industry, photographers are not given approval over how their photographs may be cropped or where

> they will appear in the magazine. It is impossible to allow all authors and photographers to see final versions of their articles and photographs for approval prior to scheduled publication. Yet, "moral rights" would require editors to do so, or risk litigation."

I know that many other magazine editors and publishers from all over the nation voiced similar concerns in their communications with you and your colleagues. Those concerns of the men and women who work "in the trenches" are as valid today as they were last year.

As an attorney who is regularly called upon to advise these men and women, I have long been troubled by the amorphous, subjective, ephemeral nature of this "natural law" notion known as "moral rights." I am especially concerned by its inhibition of editorial freedom and by its infringement upon individual freedom to enter into contracts regarding personal property.

As Mr. Carter explained, in the magazine business, time is of the essence. Readers and advertisers demand on-time publication and distribution. The last thing editors and publishers need is a requirement to consult with me or some other lawyer, and with writers and photographers (and <u>their</u> lawyers), about whether the last-minute cropping of a photograph or the on-deadline editing of an article infringes anyone's "moral rights." And even if I were to be consulted, despite supposed expertise in matters of media law, how could I possibly render objective advice and counsel on the issue of whether such cropping or editing impugns anyone's "honor" or "reputation"? My professional instinct would be to look to the agreement between

the parties to see what is permitted and whether terms are defined and conditions are spelled out. But "moral rights" exist outside the four corners of an agreement and despite anything an agreement may say. How could any attorney render sound legal advice in such a setting? How can an editor or publisher be expected to meet deadlines under such constraints? How can magazines be expected to provide information to the public on a timely basis? Those who advocate a uniform federal law of "moral rights" do indeed bear an extraordinarily heavy burden of proof.

B. Work For Hire

MPA's position on "work for hire" is founded upon the same principle: the balances and compromises embodied in the 1976 Act are fair and, on the whole, have worked well. Absent extraordinarily compelling reasons, change is simply unjustified.

1. CCNV v. Reid

Although our industry -- as well as a number of federal courts of appeal -- had a different understanding of the meaning of "employment" in section 101 of the Copyright Act, our initial analysis is that the Supreme Court's recent decision in CCNV v. Reid does not destroy the delicate and carefully crafted compromise which gave birth to the Act. Though disappointing, the Court's decision itself appears to have been crafted in the spirit of the 1976 Act, and we do not ask you today to overturn it. The impact on magazines will be significant but we will try to adjust.

The issue before the Court was the meaning of paragraph (1) of the Act's work for hire provision: who is an "employee" acting "within the scope of his or her employment"? Several U.S. Courts of Appeal issued conflicting opinions. Photographers, illustrators, and others argued that Congress meant the employer-employee relationship to be defined in the strictest sense -- a "formal, salaried" relationship. Only the Ninth Circuit agreed with that view. Magazine publishers and others argued that there is an employer-employee relationship whenever the hiring party exercises "supervision and direction" over the creation of the work. The Second, Fourth, and Seventh Circuits agreed. Still a third interpretation came from the D.C. Circuit and the Fifth Circuit -- that the principles of the common law of agency determine whether a person is an "employee." The Supreme Court agreed to review the D.C. Circuit's opinion in order to resolve the conflict. Because of the importance of the issue to the magazine industry, MPA, together with several of its member companies, submitted an amicus curiae brief supporting the "supervision and direction" test. Magazines had come to rely heavily on "freelance" contributors, such as writers, photographers, and illustrators, who are retained on a regular basis but are not salaried employees, even though they perform similar tasks and work under the supervision and direction of the editors and publishers.

Unfortunately, from our point of view, the Supreme Court rejected the "supervision and direction" test. The Court also

rejected the "formal, salaried" test. Instead, the Court endorsed the interpretation made by the D.C. Circuit and Fifth Circuit: that principles of the general common law of agency should be used to determine whether the work was prepared by an employee and that no one factor is determinative.

We believe CCNV v. Reid requires significant adjustments in the way many magazines do business. Nonetheless, we will abide by the Court's decision and we do not come here today to ask you to overturn it. Unfortunately, it seems that our friends on the other side of this issue are not satisfied by their victory before the Court. Now they want you to give them the one form of relief denied them by the Court.

2. S. 1253

S. 1253 would rewrite the work for hire doctrine and overturn the Supreme Court's decision in CCNV v. Reid by amending paragraph (1) of the Copyright Act's work for hire provision. The rigid "formal, salaried" test of whether a person is an "employee" would be enacted. This approach voids the Court's agency law standard and adopts the very same "formal, salaried" test unanimously rejected by the Court. By casting aside the well-known principles of agency law for a standard that is new and unfamiliar, S. 1253 is likely to prompt even more litigation. What does "formal, salaried" mean? The bill is silent.

Moreover, the "formal, salaried" employee standard conflicts with nearly a century of American copyright case law and

statutory development. Since the work for hire doctrine's first articulation in 1903, there has been general agreement that an "employee" for purposes of our copyright law is a term whose meaning cannot and should not be determined only by whether the person receives a "salary." As the Supreme Court said in CCNV, "Even the one Court of Appeals to adopt what is termed a formal, salaried employee test in fact embraced an approach incorporating numerous factors drawn from the agency law definition of employee which we endorse." CCNV, et. al. v. Reid, 57 U.S.L.W. 4607, 4610 (June 5, 1989). It should be noted that the world's most renowned authority on American copyright law, the late Professor Nimmer, suggested the use of agency law principles in determining whether a person is an employee. Nimmer on Copyright, Section 5.03 [B] [1], at 5-12 and n.13.1 (1986).

S. 1253's re-writing of the work for hire provision is no mere "clarification." It is a radical revision, and totally unwarranted.

Prohibition of Multi-Work Agreements. The proposed insertion of the phrase "with respect to each such work" in Paragraph (2) of the 1976 Act's work for hire provision is plainly inappropriate. Common practice in the magazine industry includes entering into a single agreement with a contributing editor in which anywhere from four to twelve articles might be commissioned to be delivered over a year on specific subjects (e.g., food, beauty, health, fashion, travel), with informal discussions before work on each article commences. Such agreements serve the

interest of both the publisher and the writer, permitting rationality in planning and guaranteeing the terms of compensation. Yet, S. 1253 would outlaw these agreements. I am at a loss to understand why.

Also, under existing law, publishers commonly commission freelance writers or photographers on a work for hire basis to cover events such as the Olympics and submit a series of photographs or articles over the course of many days. Typically, a writer's commission might be to cover the Olympics and provide the publisher with a feature length story and two smaller pieces each week. Naturally, because neither the publisher nor the writer can predict the course of events at the Olympics, they would operate today with a single, flexible work for hire agreement that provides for coverage of issues that arise unexpectedly. The desirability of such agreements should be clear to everyone. Regrettably, for example, we have seen the focus of recent Olympics shift swiftly and dramatically from the action on the playing field to the activities of terrorists, from the results of the 100-meter dash to the results of the winner's drug test. Does S. 1253 require that a written agreement be executed as each story "breaks" before it can be covered on a work for hire basis? Such a requirement would serve no one's interest -- certainly not that of the reading public.

The Proposed Requirement of Execution of a Written Agreement Before the Commencement of the Work. The proposal to add the words, "before the commencement of the work," in Paragraph (2) of

the 1976 Act's work for hire provision is perplexing. What is the moment of "commencement" of a "work"? The bill offers no guidance. Courts will spend years sorting this out. But, draftsmanship aside, this provision serves no one's interest. Let me give you an example from our industry. Magazine editors frequently use the telephone to handle the commissioning of articles on fast-breaking stories, as well as to provide additional commissions to writers or photographers already on assignment in remote locations. If a writer is in Bonn, Germany and is asked on the telephone to cover an ecological disaster in Southern France on a work for hire basis, why should the fact that a written agreement is not signed (indeed, cannot be signed) until after the writer has begun the article preclude enforceability of that agreement? Again, everyone loses. The publisher does not get the story; the writer does not get the assignment; the public does not get the information.

Conclusion

Mr. Chairman, the past year has seen two momentous events in the world of American copyright law: adherence to the Berne Convention and issuance of the Supreme Court's decision in CCNV v. Reid. Still, the integrity of the 1976 Act and its carefully crafted balancing of interests remain intact.

As you observed in opening this series of hearings on June 20: "It is incumbent on those advocating change in the copyright law to show that such change is necessary." Those who would have you make radical changes -- such as introducing "moral rights"

into our copyright law or rewriting the principles of the "work for hire" doctrine -- should be required to bear the requisite burden of proof.

The case for such radical change has not been made and, we submit, cannot be made. The law which the Congress wrote in 1976 works.

Let's not tamper with success.

Magazine Publishers of America 1211 Connecticut Avenue, NW Suite 406 Washington, DC 20036 202 296 7277

MPA

November 30, 1989

The Honorable Dennis DeConcini
Chairman, Subcommittee on Patents,
Copyrights and Trademarks
327 Hart Senate Office Building
United States Senate
Washington, D. C.

Dear Mr. Chairman:

Permit me to express my personal appreciation for the courtesy which you, your colleagues, and your staff extended to me during my recent visit to Washington to testify before the subcommittee in my capacity as Chairman of the Legal Affairs Committee of the Magazine Publishers of America (MPA).

I have fully briefed my committee on the matters which were discussed during the course of the hearing. You will be pleased to know that, as a result of the concerns which you expressed during the hearing, special study is being given to the use of "check endorsements" in the work-for-hire context.

I wish to clarify my oral testimony concerning magazine publishers' use of check endorsements. I understand that, in some circles, my remarks are being construed as an outright rejection of the lawfulness and efficacy of all uses of endorsement language. Such a construction of my testimony is not accurate.

Some MPA publishers do use check endorsements to confirm the parties' work-for-hire understanding, often in conjunction with other documents (such as work orders) and/or the established pattern and practice of their work relationship. There can be no doubt as to the legality, efficacy and propriety of such "work-for-hire" check endorsements in such cases. Indeed, the use of check endorsements to confirm an agreement -- and, in the eyes of the law, to constitute the requisite "writing" for Statute of Frauds purposes -- is a well established and widely accepted practice in many businesses. For example, parties to real estate transactions often use check endorsements to confirm terms and conditions.

To my knowledge, as I hope I made clear during my oral testimony, no MPA publisher engages in the practice of using check endorsements in situations where the endorsement is the first notice to the contributor that the work is to be considered a work-made-for-hire. In such situations -- which we believe are extremely rare -- the endorsement could not reflect any prior understanding of the parties. The use of such endorsements in such cases would not be defended by MPA.

Please be assured of MPA's continuing support for your efforts to ensure the fair operation of our nation's copyright law. Once again, I thank you for your courtesy.

Sincerely,

Victor Kovner, Esq.

cc: The Honorable Orrin Hatch

Senator DECONCINI. Thank you.
Mr. Veliotes?

STATEMENT OF NICHOLAS A. VELIOTES, PRESIDENT, ASSOCIATION OF AMERICAN PUBLISHERS, WASHINGTON, DC

Mr. VELIOTES. Thank you very much, Mr. Chairman. You do have my longer statement. I have also submitted for the record a statement by three copyright experts on the moral rights situation. Although I will not be addressing moral rights here, I hope the record will show that we are concerned, very concerned and very——

Senator DECONCINI. Indeed, the record will show that. This is the second of three hearings. We will have all of that on moral rights before us. We're going to do another hearing on that particular area, so be assured that your statements—the same with you, Mr. Klipper—will be included.

Mr. KLIPPER. Thank you.

Mr. VELIOTES. Thank you very much.

Senator DECONCINI. We won't charge you for that time.

Mr. VELIOTES. Our basic concern is that we do not believe that the system is broken. Since it isn't, we think it would be a mistake to try to fix it along the lines of S. 1253. We are not calling into question here anyone's motives; certainly not these people who spoke before us today. This was a very sincere group of human beings who have problems as they perceive them, and certainly not Senator Cochran. We understand the concern, and we all share this for our creative artists.

Basically, we believe that changes along the lines proposed would be harmful and would lead to more unpredictability and uncertainty in an already highly complex and intensely competitive area and add even more risk to the publishing process.

I will only mention one example from book publishing, and that's textbook publishing, where you may invest $20 to $30 million. It could take you 5 years to develop a textbook. You will have graphic artists; you will have photographers; you will have a series of authors, maybe dozens of people involved. There is no guarantee that you're going to sell it. If you do sell it, then you must revise it periodically, and it is important that you have the future rights to these works.

I would like to end my statement with one clarification. Mr. Clancy's experience, as I understand it, is highly unusual with respect to book publishers and authors. Tradebook publishers work on clearly defined contractual principles, and I'm certain that Mr. Clancy is satisfied with his current publishers. I should note that they are members of my association.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Veliotes follows:]

TESTIMONY OF AMB. NICHOLAS A. VELIOTES

President, Association of American Publishers

Mr. Chairman, I am here today to offer the views of the Association of American Publishers (AAP) -- a member of the Committee for America's Copyright Community -- on two important issues: moral rights, as they might apply in the context of the publishing industry, and the work-made-for-hire doctrine, particularly as it would be dramatically recast if S. 1253 were to pass. AAP strongly opposes both the adoption of a federal moral rights regime and the enactment of S. 1253. The copyright and contractual systems under which our members do business today have placed the United States in a position of world leadership in the production and export of all manner of books and educational materials. No one has demonstrated the compelling need to drastically change our quite successful system by imposing moral rights doctrine upon it or by disturbing the balance now present in the work-made-for-hire doctrine.

AAP is a trade association of book publishers. Our approximately 300 members, who employ more than 40,000 people, publish between 70 and 75% of all books published in the United States, including text, technical and reference books, works of fiction and general nonfiction. In addition, our members publish a variety of works in other media including computer software and databases.

This hearing raises the threshold policy question of whether to superimpose vague, subjective, and wholly

unpredictable new rights upon a long-standing, balanced and successful copyright system. Moral rights, with their roots in the Continental civil law tradition, conflict with many traditional contract and business practices, and would radically redirect our entire copyright system. The second subject of the hearing, work-made-for-hire doctrine, involves the determination of who should own certain traditional copyright rights and the formula by which that determination is made.

Before I address today's questions in some detail, I would like to make clear AAP's position regarding a fundamental issue underlying both the moral rights and work-for-hire components of today's hearing: the notion that relationships between publishers and their contributors are seriously imbalanced.

Our members, together with other members of the copyright community, daily produce thousands of different copyrighted works: textbooks, novels, biographies, dictionaries, encyclopaedias, popular and scholarly periodicals, tests and related educational materials, newsletters, computer software and data bases, and more. The creation and publication of almost every one of these works is the subject of a separately negotiated contract (including those establishing consensual copyright relationships) between publishers -- both large and small -- and contributors -- who run the gamut from individual authors of

unsolicited manuscripts to independent contractors having a firm relationship with a publisher to employed staff. Both publishers and creators need the ability to ensure that their contractual rights and obligations will be preserved.

The relationships among those who invest in and perform the publishing function, on the one hand, and those who create, on the other, have been established over a long period of time. The allocation of economic (not moral) rights in the Copyright Act of 1976, which provides the basis upon which these relationships rest, was the result of a long process during which Congress heard from all parties and established a delicately balanced system in which the rights of creators, publishers and the public were all taken into account.

While some recent hearings -- and perhaps today's -- may create the impression that relations between publishers and contributors resemble those of two warring peoples, that is simply not true. We need contributors; they need us. We have worked -- and will continue to work -- with contributors to improve the process by which rights are contractually established and transferred. Our system can continue to thrive, so long as its inherent balances are left undisturbed.

To adopt, as a nation, a system granting certain non-copyright owners rights to control or hinder the prccess by which publishers seek to exercise the copyright rights that

they own (and for which they have paid), would open the floodgates to a wave of vexatious litigation that could threaten to end our enviable position as the world's foremost producer of copyrighted works.

I would like to turn now to a detailed examination of today's issues.

I. Moral Rights

Moral rights, however benign the name may sound, would, simply put, disturb the balance now manifest in our copyright system to a greater extent than anything short of repeal of the copyright statute. Copyright, as the Supreme Court and the Congress have often noted, is designed to promote the dissemination of works of authorship.[1] Moral rights are designed to impede or block dissemination by giving authors and their heirs, after the copyright in a work has been transferred or licensed to a publisher by contract, a right of aesthetic veto over the distribution of that work as reproduced or modified by the publisher.

A few examples of the incredible effects of moral rights may be seen in judicial decisions from moral rights nations:

- The Canadian creator of a sculpture portraying geese in flight enjoined the owners of the sculpture (who owned the shopping center where it was displayed) from draping the geese with colored ribbon as part of a Christmas display. The court

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[1] However one feels about whether copyright owners or members of the public at large are the intended primary beneficiaries of the current copyright system, it is completely clear that the purpose of the system is to induce the creation and dissemination of creative works.

credited the sculptor's objection to an offense to his honor and reputation as a result of the temporary seasonal ornamentation of his work.[2]

- The well-known Paris department store, Galeries Lafayette, used, in its window decorations, certain reproductions of public domain paintings by the French artist Henri Rousseau, who had died more than sixty years before (so that the copyright had expired). The reproductions -- which did not bear Rousseau's name -- employed different colors from the originals and altered some images. The artist's granddaughter succeeded in having a court order the reproductions removed.[3] This result, of course, is totally at odds with the concept of the public domain as understood in the United States.

- The author of a children's book about to be published in the Netherlands succeeded in enjoining the publication of the book because the illustrations being used by the publisher as an adjunct to the author's text were held by a court to be sufficiently inferior as to prejudice the author's reputation and her value as an author of children's books.[4] Assuming that the publisher had contractual freedom to select and edit the illustrations, this result would generally not be supported under current U.S. law.

- In Italy, an employer who approves and accepts works completed by an employee in the course of employment is not authorized to modify that work without the employee's consent, unless such modification is regarded as technically necessary to adapt the work to its intended use.[5] This is directly contrary to the U.S. work-for-hire principles discussed in Part II of this testimony,

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[2] Snow v. Eaton Centre, Ltd., 70 Can. Pat. Rptr. 2d 105 (Ont. High Ct. 1982).

[3] Judgment of March 13, 1973, Trib. gr. inst., Paris; discussed in Merryman, The Refrigerator of Bernard Buffet, 27 Hastings L.J. 1023, 1030 (1976) (hereafter "Merryman"). Absent attribution, public confusion was not likely.

[4] Pres. Dist. Ct. Utrecht, 27 Nov. 1975, discussed in Nimmer & Geller, International Copyright [Netherlands] at 45 (hereafter "Nimmer & Geller [country]").

[5] Nimmer & Geller [Italy] at 40.

> as well as to custom, practice and investment objectives of domestic businesses, and to Congress' express determination not to modify those principles to restrict the scope of employers' rights.

Unlike the process of wholesale statutory revision that led to the enactment of the current copyright law, the adoption of a system of moral rights would amount to the superimposition of powerful -- if unpredictable -- new limitations on copyright owners' rights that would throw the current balanced and thriving copyright system into chaos. We submit that such a fundamental change should only be considered if, and when, its proponents demonstrate clearly and convincingly that the status quo is undesirable. No such demonstration has been credibly made. In the absence of such a showing, the radical surgery necessary to graft moral rights onto a healthy copyright system -- surgery that could gravely injure the "patient" -- should be rejected.

I would like to explain in some detail why AAP, as many other organizations comprised of copyright proprietors, strongly opposes the enactment of any broad, uniform, national moral rights regime. We share the view expressed by the last two Congresses and a wide variety of copyright experts[6] that the laws of the United States today --

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[6] See, generally, U.S. Adherence to the Berne Convention, Hearings Before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 99th Cong., 2d Sess. (1986), including the testimony of the Director General of the World Intellectual Property Organization and the Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention.

including the Copyright and Lanham Acts, together with state statutes and common law governing privacy, publicity, and reputational torts -- amply protect authors against real (rather than subjective) injury to their reputations, whether by omission of their names from copies of their works distributed to the public or by gross distortions of their works.[7] We agree with the congressional determination that the system in place today satisfies the obligations of Article 6-bis of the Berne Convention, and that no disequilibrium has been demonstrated of a type that would merit legislative modification of that system.

A full-blown moral rights regime, as found in the laws of France and other European nations, is not only not necessary in the United States but would ultimately be harmful to our entrepreneurial infrastructure. Our copyright system is the foundation upon which the United States copyright community (including AAP's member publishers and other distributors of copyrighted works) is built. This community provides the entire world with educational, informative and entertaining products and services. Indeed,

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[7] See, e.g., Dodd v. Ft. Smith Special School District, 666 F.Supp. 1278 (W.D. Ark. 1987) (Lanham Act prohibition of sale of goods bearing "false designation of origin... description or representation" held to cover distribution of copies of book bearing name of someone not the author; injunction issued); Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976) (licensee's unauthorized changes in work (omitting 24 minutes of 90-minute television program) violated licensor's right -- under the Copyright Act -- to prepare derivative work).

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it is no accident that the United States is the world's leading producer of these products and services. Much of that lead is attributable to our copyright system; a system based on property rights that, in keeping with long-standing Anglo-American principles, may be transferred, licensed, waived or otherwise dealt with freely by their owners, without unreasonable restraints on alienation.

AAP, along with several other organizations and firms, has funded an exhaustive examination -- by three copyright experts -- of the doctrine and effect of moral rights. I am submitting copies of this study for the record. It demonstrates the extent to which the application of moral rights would conflict with copyright and business traditions in the United States. It makes it clear that moral rights on the European model -- the only one we know -- would place AAP members in the position of literally never knowing with certainty whether and to what extent they could market the works for which they have, often at great expense, acquired copyright rights or licenses. The possibility that an individual author or his heirs might, many years after a traditional publishing contract was signed, have a legal basis by which to prevent the preparation or marketing of a publisher's new abridgement, revision, or translation of a work, or even the design of a book jacket for a new edition, would unacceptably increase the uncertainty now inherent in AAP members' lives.

There is already enough risk in book publishing. Today our members must concern themselves, in publishing a trade book, with whether a particular manuscript will result in a book for which the public has an appetite, how best to edit such a manuscript, how to ensure that it contains no libellous or copyright-infringing material, how to have high quality copies timely produced in the proper quantity at a reasonable price, how to deliver those copies to the public in an efficient and cost-effective manner, and, if all goes well, how to proceed with respect to subsidiary rights, such as foreign language, electronic format and magazine excerpt rights. In publishing a textbook, a publisher faces additional risks in deciding how best to satisfy the diverse -- and sometimes inconsistent -- criteria of multiple textbook adoption authorities and how to integrate multiple contributions into a unified work.

The added uncertainty engendered by inserting new non-economic rights into our law could easily alter publishers' assessments of the risks attending a particular project. Increased risks mean, invariably, increased costs, as new risks must be evaluated and insured against. Funds that might have been invested in new or untried authors would have to be paid to lawyers, insurance carriers, or escrowed against the inevitable unpleasant surprise. As a result some titles would likely never be published.

The problem with moral rights, as they have developed in Europe, is that, unlike the rights known there as "economic rights" (and here as "copyright"), their shape is largely unclear and their invocation seems at times, frankly, almost whimsical. I do not mean to suggest that I treat or take moral rights lightly; nothing could be further from the truth. I simply mean that to give authors veto power that they may exercise according to their own subjective beliefs about the appearance or content of copies of works in which they no longer own the copyright -- because they have freely contracted it to a publisher -- would be to invite some authors to indulge, at least on occasion, in capricious obstructionism.

In response to such obstructionism, courts would be required to do that which Justice Holmes correctly and eloquently argued that they ought not engage in: the allocating of legal rights based on aesthetic judgments.[8]

For book publishers, an expanded moral rights regime affording perpetual inalienable rights of paternity and

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[8] "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation . . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value -- it would be bold to say that they have not an aesthetic and educational value -- and the taste of any public is not to be treated with contempt." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).

integrity would in many instances be disastrous. In many projects, particularly those involving the collaboration of many contributors, publishers must heavily edit the many contributions to permit them to fit comfortably into an anthology, textbook, encyclopaedia, or other work. They must also have the right, over time, to refine, revise, or update such modifications. For example, in school book publishing, editing is often required to meet the requirements of state textbook commissions, or to remove material that could generate libel, copyright infringement, or other legal liability. If the changes made by editors were subject to after-the-fact veto by the authors or contributors,[9] many works would either be much more time-consuming (i.e., expensive) to prepare, or would disappear from the market altogether.

Finally, I think it is important to consider the history of moral rights abroad. Those rights are rested in the civil law systems of Continental Europe and the bureaucratic and technological environment of earlier centuries. By contrast, book publishing operations today necessarily involve the collaboration of numerous people, including

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[9] The important issues discussed in Part II of this statement -- concerning works made for hire -- are essentially independent of the "moral rights" question whether the person creating or contributing to a work (who does not own any copyright interest therein by virtue either of a contract or application of the work-for-hire doctrine) should have an aesthetic veto over future lawful -- under copyright principles -- reproductions or other uses of the work.

authors, editors, illustrators and designers and require prompt decision-making. In addition, European moral rights regimes have developed in an environment having no strong notion of freedom of speech and press, and thus often conflict with the strong First Amendment tradition in the U.S., which has allowed American creativity to flourish. The insertion of foreign moral rights notions into the publishing process, especially when American traditions run counter to these notions, would create unnecessary confrontations and litigation. There is simply no compelling need to graft a foreign scheme of ancillary rights onto our present, singularly successful system. AAP strongly opposes any such changes in our law.

II. Works Made For Hire

The work-made-for-hire doctrine, as developed in Congress and the courts, has proven to be an indispensable tool for AAP's members who publish works (such as books, instructional materials, and tests) that are the product of a collaborative effort involving large numbers of people who, for very practical reasons, cannot all be employees of the publisher. These contributors work under a wide variety of compensation arrangements -- royalties, flat fees, and hourly rates among them -- as determined by negotiations.

The doctrine has been shaped by complex negotiations between publishers and contributors, the compromises to which both sides agreed (which are reflected in the statute),

and court decisions. It allocates ownership rights, in certain circumstances, to those publishers who undertake the economic and creative initiative and control over the authorship process, and who bear the economic risk for the creation of certain works.

The principle that an employer should own the copyright in a work created, within the scope of employment, by an employee has long been recognized under the rubric of "work made for hire." Since 1978, the Copyright Act has expressly provided that, in the case of such works, the employer shall be deemed the "author" of such works and thereby automatically own the copyright therein,[10] but the definition of "employee" has been left to the courts. The statute also now provides that a work made by an independent contractor on commission may be a work made for hire if:

- the work falls into one of the categories specified in the law,[11] and
- the commissioning and commissioned parties so agree in a signed writing.[12]

During the last decade, many courts have sought to apply

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[10] 17 U.S.C. §201(a).

[11] These are: contributions to a collective work, parts of motion pictures or other audiovisual works, translations, supplementary works (forewords, afterwords, illustrations, maps, and the like), compilations, instructional texts, tests and answer materials therefor, and atlases.

[12] 17 U.S.C. §101.

these statut[illegible] definitions; they did so in ways that were not always consistent.[13]

The recent decision of the Supreme Court in CCNV v. Reid[14] has resolved many of the inconsistencies in the application of the statutory definitions of works made for hire by holding that the term "employee" should be judged in accordance with agency law principles. While it is true that some AAP members would have supported a different result in that litigation, the decision has been accepted by many of our members, particularly because it resolves a split in the Circuits by incorporating into the copyright law a relatively well-developed body of law concerning how one determines whether a particular person is an "employee."

CCNV was decided in the spring of this year. It would seem prudent, then, to determine the impact of the decision before contemplating legislation that would undermine it. As the Supreme Court has noted, the current statutory work-made-for-hire provisions represent a compromise made in 1965

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13 Compare Aldon Accessories, Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir. 1984) and Evans Newton, Inc. v. Chicago Systems Software, 793 F.2d 889 (7th Cir. 1985) (independent contractors may be employees if commissioning party exercises sufficient supervision over work (thus obviating the need for reference to the categories and signed writing requirements)) with Easter Seal Society for Crippled Children, Inc. v. Playboy Enterprises, 815 F.2d 323 (5th Cir. 1987) ("employee" determination governed by rules of agency; independent contractors generally not employees) and Dumas v. Gommerman, 865 F.2d 1093 (9th Cir. 1989) (independent contractors can never be employees).

14 109 S.Ct. 2166 (1989).

to which the contending parties -- including AAP's direct ancestors -- agreed. That compromise involved not only sections 101 and 201 of the law -- concerning works made for hire -- but also the termination and duration provisions. The decision in CCNV restates the balance inherent in the compromise; S. 1253, if enacted, would overwhelm it, and the provisions of this bill cause us substantial concern.

The bill would provide that the "scope of employment" prong of the statute's definition would apply only to works prepared by "formal salaried employees." This contrasts with the rule announced by the Supreme Court that one should look to conventional agency law to determine who is an "employee" in the context of works made for hire.

While there exists a large body of law concerning the term "employee" -- including the cases cited by the Supreme Court and set out in the Restatement of Agency -- to our knowledge the phrase "formal salaried employee" has never been used in any "employer-employee" decisions -- copyright or otherwise -- apart from the Gommerman case, in which the Ninth Circuit adopted it as a standard regarding works made for hire, and CCNV, where the Supreme Court rejected it. It is defined neither in the bill nor by the common law, and would likely require elucidation in court if it became part of the statute.

Many people -- particularly in publishing -- are increasingly tele-commuting, sharing jobs, sharing employers,

and creating new modes of employment and means of compensation. In this environment, with no precedents from which guidance may be sought, the meaning of "formal salaried employee" would be difficult to determine. Unfortunately, S. 1253 does not provide even an unclear rule on this crucial point.

With respect to commissioned works, S. 1253 raises similar grave uncertainties. The requirement that an agreement be signed for "each such work" at a time "before commencement of the work" raises many questions whose answers can not be gleaned from the bill. With respect to certain commissioned works such as contributions to collective works, standardized test questions, dictionary definitions, encyclopaedia articles, and supplementary works, traditional practice has been to obtain single agreements covering all contributions of a "commissionee" to a particular work. Under the bill, however, not only would all such agreements have to be signed in advance (as is not now the case), but it appears that each separate contribution might require a separate signed writing.

It is also unclear when the bill would treat "the work" as having "commenced." Would it be

- When a free-lance writer calls an editor on the telephone to discuss a possible project?
- When the writer submits a detailed outline, treatment, or chapter -- that, by operation of law, is copyrighted -- for consideration prior to being commissioned?

- When the writer begins work on the entire work as specified in the commissioning document?

And, for that matter, in the case of an encyclopaedia, would the commencement of work on any part of the encyclopaedia end the time available for signing any agreements "in advance," or would each separate contribution be a "work" for this purpose? How would contributions to later editions be treated?

The "separate writing in advance" standard would leave so many questions unanswered that it likely would amount to little more than grist for lawyers. Large, well-represented corporations will be able to protect themselves, while small entrepreneurs will find themselves unjustly deprived of rights in works to which they truly gave birth.

One of the results of S. 1253 would be an administrative nightmare: not only an explosion of paperwork, but a drastic increase in the time spent arranging to publish a work. Negotiations over terms, document transmittals and the like (all of which might have to be completed before creative work begins) would consume time that simply does not -- and cannot -- exist in tight production schedules. Further, if each contribution requires a writing, and if such writings must be executed in advance, then publishers may be forced to seek, for example, separate writings covering later works at the same time that agreements covering earlier works are executed. Some works, however, might not lend themselves to any such changes in

current practices. Instead, many publishers would simply increase their use of "in-house" employees. This would mean a decline in the use of free-lancers of all types, which seems unlikely to be the intent of the bill.

Another portion of the bill addresses joint works. It is not clear to AAP that any portions of the copyright law governing joint works require revision.

The provision in S. 1253 that commissioned works could only be joint works of the commissioning and commissioned parties if a writing to that effect were signed "before the commencement of the work" is fatally flawed because it fails to provide any rule for allocating ownership in a work to which both parties contributed copyrighted authorship without executing the necessary writing, or after executing it "too late."[15] Surely the absence of the writing would not divest the commissioning party's rights in its contribution, but the bill would deny the work joint status, and thereby leave its ownership and marketability unclear. This would lead to the unprecedented -- and unfortunate -- result that neither author would clearly own a work containing two or more valuable contributions. Thus the work might never reach the public.

In short, we oppose enactment of S. 1253 because:

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[15] The purpose of any law's allocation of rights among two or more people should be to provide clear rules for the acquisition, enforcement and alienation of rights in property when those people have no agreement; S. 1253 does not accomplish this.

- any legislative reversal of the recent, unanimous, unambiguous decision in CCNV is premature;
- certain provisions of S. 1253 are unclear and their sorting out would lead to tremendous confusion, litigation, and expense; and
- other provisions, although somewhat clearer in meaning, would upset the compromise that the Supreme Court has just endorsed and be unacceptably burdensome to our members.

I would be happy to respond to any questions.

Senator DECONCINI. Thank you very much.
Mr. Fishman.

STATEMENT OF R. JACK FISHMAN, PUBLISHER, LAKEWAY PUBLISHERS, MORRISTOWN, TN, REPRESENTING THE NATIONAL NEWSPAPER ASSOCIATION

Mr. FISHMAN. Mr. Chairman, members of the subcommittee, my name is R. Jack Fishman. I am editor and publisher of the Citizen Tribune in east Tennessee. It is a daily and Sunday newspaper. I am also president of Lakeway Publishers, which owns six smaller papers in middle Tennessee. For the past year I have served as chairman of the Government Relations Committee of NNA. I have also served as president of the Tennessee Press Association.

NNA is a national trade association representing the interests of small daily and weekly newspapers throughout the United States. It was founded in 1885 and has more than 5,000 members. It is the oldest and largest national trade association in the newspaper industry. NNA is a member of the Committee for America's Copyright Community. I have a full text of my written testimony and with your permission I would like to submit it for the record, then I will briefly try to summarize.

Senator DECONCINI. Without objection, it will appear in the record.

Mr. FISHMAN. I kind of feel like the guy who came to the wrong meeting because everybody else has discussed the work for hire issue and specifically S. 1253. In preparing my remarks, I would like to more specifically talk about moral rights in the newspaper industry, which I feel is critically important.

In preparing this testimony I asked Robert Brinkmann, general counsel of NNA, to briefly summarize the legal aspects of the moral rights doctrine. I have attached that summary to this testimony as an appendix. I am not a lawyer and do not pretend to understand the intricacies of the moral rights doctrine, but I have learned enough to know that the imposition of a moral rights system would not permit the newspaper industry to continue to do business and serve the public in the same fashion that it has for decades.

Moral rights in the newspaper industry simply are not compatible, and there are three particular principal factors. One is the legal factors involved; the time factor involved; the signoff provisions; and then who actually is the author.

Many of the European countries have concluded that their legal systems cannot provide for moral rights for newspapers.

The doctrine simply is unsuitable in our business. In order to run my newspaper properly, I have to know—and I have to absolutely know—that I have the unconditional rights to those stories and photographs that I plan to run and that I am free to edit and crop them as I wish and when I wish. Legally, I am the one who is held responsible under such laws as libel and privacy for the content of the stories and photographs that I run in my paper. That means I not only have to bear the consequences of my own actions, but I also have to bear the consequences of some others that do publish in our paper.

Under the moral right of paternity, an author has the right to be identified with a work, to prevent others from being named as the author of the work, and to prevent others from falsely attributing to him or her the authorship of a work which he or she did not create. On the very front end, all of this sounds very reasonable. Newspapers, after all, do run bylines. But many short stories do not have bylines. Many stories are the result of contributions from several staff members. We simply could not put bylines on every story and could not always identify on a timely basis each contributor. Further, the story may be reedited several times before it actually becomes a final product. Even if we put bylines on every story, we would run the risk of challenges concerning who actually did the major part of the story, who actually did write that particular story.

The second part has to do with integrity. Under the moral right of integrity, an author has the right to prevent others from making deforming changes in his work. Allowing a reporter to prevent changes in his stories which he felt were deforming would spell disaster for our industry.

There are a number of reasons for this. Timing is very important. So is the question of conflicts between reporters and editors. So is the question of editorial oversight. You can imagine the confusion in the composing room of a daily newspaper if I have to go find a reporter that happened to write the high school football story last night and ask him if I can delete the third paragraph. I can't do that. I can't find him. I may not be able to do that.

These are the major factors that we feel are very important when you are considering the moral rights matter in the newspaper industry.

I haven't even had time to speak about the advertising complexities, the display advertising, the artwork, and the display ads of automobiles or fruit or VCR's or some creative art that has been produced that we use in the display ads. This creates another whole ball of wax that I hope you will seriously consider.

I would be glad to try to answer any questions that you may have.

[The prepared statement of Mr. Fishman follows:]

TESTIMONY OF R. JACK FISHMAN
PUBLISHER, CITIZEN TRIBUNE
MORRISTOWN, TENNESSEE
ON BEHALF OF THE
NATIONAL NEWSPAPER ASSOCIATION
BEFORE THE
SUBCOMMITTEE ON PATENTS, COPYRIGHTS & TRADEMARKS
OF THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE

National Newspaper Association
1627 K Street N.W., Suite 400
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September 20, 1989

Statement of Jack Fishman
on behalf of the National Newspaper Association
September 20, 1989

Mr. Chairman, members of the subcommittee, my name is R. Jack Fishman, and I am editor and publisher of the Citizen Tribune, a daily and Sunday newspaper in East Tennessee with a circulation of about 24,000. I also serve as President of Lakeway Publishers, Inc., which owns six other newspapers in Tennessee, whose circulations range from 6,000 to 8,000 each. For the past year I have served as Chairman of the Government Relations Committee of the National Newspaper Association (NNA). I have also served as President of the Tennessee Press Association and as Chairman of the Economic Development Board for the State of Tennessee.

The National Newspaper Association is a national trade association representing the interests of small daily and weekly newspapers throughout the United States. Founded in 1885 and with more than 5,000 members, NNA is the oldest and largest national trade association in the newspaper industry.

Introduction

I am here to address the issue of moral rights and the newspaper industry. I will not address the issue of work-for-hire, nor S. 1253. NNA has no position on the bill for we are still assessing both the use of work-for-hire in the industry, and the recent impact of the Supreme Court decision, as well as what impact that decision and S.1253 would have on the industry. Given the complexity of the issue, however, NNA would urge the Committee to carefully consider whether it would be premature to take action in this area.

In preparing this testimony, I asked Robert Brinkmann, General Counsel of the National Newspaper Association, to briefly summarize the legal aspects of the moral rights doctrine. I have attached that summary to this testimony as an Appendix. For purposes of

my testimony I limit the term moral rights only to the integrity and paternity rights as described in that Appendix. That Appendix also briefly describes several other, rather bizarre concepts that apparently fall under the moral rights rubric.

Mr. Chairman, members of the subcommittee, I am not a lawyer, and do not pretend to understand all the intricacies of the moral rights doctrine. I have learned enough, however, to know that the imposition of a moral rights system would not permit the newspaper industry to continue to do business and serve the public in the same fashion that it has for decades. Moral rights and the newspaper industry simply are not compatible, a conclusion which a number of European legal systems have reached. See Appendix.

Before turning to the core of my testimony, I should mention that it seems that the idea of moral rights really turns upon the idea that a piece of writing or a piece of art somehow and in some essential way still belongs to the author even after the piece is sold. The doctrine seems to create an exception to the principle of free enterprise and private property upon which our American system is based, and I find that objectionable.

Much more important, however, is that I also find as a practical matter that the doctrine is unsuitable for the publishing industry. In order to properly run my newspaper, I have to know--and absolutely know--that I have the unconditional rights to those stories and photographs I plan to run, and that I am free to edit and crop them as I wish, when I wish, and how I wish. Any other arrangement would be inadequate from a business point of view, and simply would not work.

From a legal point of view, the situation is even more serious. I am the one held responsible under such laws as libel and privacy for the contents of the stories and photographs that I run in my paper. That means that I not only have to bear the consequences of my own actions, but also that I have to bear the consequences of at least

some of the actions of all those who are published in my paper. That is an enormous risk to have to shoulder, and I attempt to minimize it by maintaining very strict editorial oversight and control of my newspapers. Any change in the laws of this country which would remove or lessen the editorial control that I can maintain over my newspaper would be intolerable, inequitable, and--I'd be willing to bet--unconstitutional.

A. Paternity.

Under the moral right of paternity, an author has the right to be identified with a work, to prevent others from being named as the author of the work, and to prevent others from falsely attributing to him or her the authorship of a work which he or she did not create. Although as an initial proposition this sounds reasonable--newspapers do after all usually provide bylines--upon closer examination one finds a host of problems.

First, some stories do not have bylines. This is particularly true of small stories, summations, and wire-service pieces. To force editors to put bylines on every bit of summary, synthesis, and filler would be silly; and it would make my product look terrible. More significant, however, is the fact that often it is not clear who is the "author" of a particular story or feature. This is because stories are often put together by teams of reporters--perhaps several teams on big stories--and heavily edited by editors. Indeed, an editor may actually create the story himself by taking several paragraphs from one team of reporters, another from the background research of another team, and finally a lead or conclusion from yet another reporter. I'm sure the members of this Subcommittee have noticed stories like this in the Washington Post or other publications.

Further, that story or feature might be reedited several times more by several other editors before a final product is settled upon. And, to that "final" story, last minute changes

may come from the publisher. It is the publisher, after all, who must pay the costs of defending the story in court if the newspaper is sued for defamation or invasion of privacy.

By the time this process is complete, it often would be simply impossible to identify with any degree of rationality who, how many, or to what degree various individuals are authors of the story. To impose some sort of moral right of paternity on this process would force me to pick and choose among all the contributors to one story. To force me to so choose would force me to assume the risk and the complication of having to defend these types of decisions--perhaps in court--against contributors who thought that their contribution was notable enough to deserve credit. And, assuming that I am honest and wish to give credit where credit is due, what would happen to me in court? What standards would the judge use? What could I do to minimize my risks?

You can imagine the difficulties, and the potential ego involvement. Even the thought of having to referee such fights sends shivers down my spine. And, just to complicate things a bit more, I should point out that since many newspapers use computer systems of one sort or another for writing, editing and composition, there might well be fights over who actually wrote what since, by the time a hard copy became available, memories might be a bit hazy concerning who actually contributed a particular sentence, or a particular part of a sentence.

Putting the names of all the contributors to a story in a byline (which would be an absurd result in and of itself given the number of individuals who work on some stories) would not even solve the problem. I still would risk challenges from individuals who thought that the story was "really" their's and consequently wanted to prevent me from falsely attributing "their" story to others.

For these reasons, implementing a moral right of paternity in the newspaper industry simply would not work, and trying to do so would create chaos.

B. Integrity

Under the moral right of integrity, an author has the right to prevent others from making deforming changes in his work. Allowing a reporter to prevent changes in his stories which he felt were "deforming" would spell disaster for our industry.

There are a number of reasons for this. Some have to do with the timing of putting together a newspaper, others with the question of conflicts between reporters and editors. Still others have to do with the question of having editorial oversight and control rest in the hands of the individual who is legally responsible for the contents of the stories and photographs.

If writers had to approve edits of their stories before they could be run, the finely tuned systems that create daily newspapers would grind to a halt. A newspaper, particularly a daily newspaper, is an extremely time-sensitive medium, and there simply is not a sufficient amount of time in the process to get sign-offs from writers at each and every stage of the editing process.

Often it is not hours, but minutes that count with breaking stories. Brief delays can be deadly, and can mean not going with a story. The problems smaller newspapers would face would be of a certain variety--how and where (with only twenty minutes left to deadline) to find the high school stringer from the other side of the county who wrote the four paragraph (now three paragraph) high school football story and who took the picture of the winning field goal. The problems larger newspapers would face would be of the same variety but of a different magnitude--how and where (with twenty minutes left to deadline)

to find the reporter who called in his story via modem and his photographs via satellite from Tiananmen Square in Beijing .

What are the Grundy County Herald and the New York Times supposed to do if they simply have not found the writer by deadline and consequently do not have his sign-off to the edits? Would the public's interest be served by not going with either of these stories? Most certainly, the newspapers' business interest would not. News is news only if it is new, and not if it is old.

Another aspect of the timeliness question concerns the identification problem I mentioned earlier, in connection with my remarks on paternity. Before one can get approval of authors, one needs to figure out who they are, how many there are, and to what degree they are authors. As I indicated earlier, that may be a very complicated and time-consuming question to answer.

And what about the context of the stories? My understanding is that the moral right of integrity could give a creator the right to veto the way in which his work is used, since if that use offends his sensibilities, it would distort the work. Does that mean that we would have to clear layout with each writer? What about the artwork we might use on a page with pro-life and pro-choice op-ed pieces. Would we have to determine what was the artist's view on abortion, and make sure the placement of the artwork satisfies the artist? That is, would we have to see that the artwork is more closely aligned, from a visual perspective, with one story as compared to the other, or carefully aligned with neither? Would we then have to go back to the writers, and make sure that neither of them were offended by the artwork? Where would it stop?

I would also face an intolerable situation with syndicated materials or wire story materials. Often, as pages are being laid out in composing rooms, lines, sentences, or

paragraphs of syndicated pieces are cut in order to fit everything onto the page. Sometimes good judgement is used; sometimes not. It all depends upon the quality of the particular editor on duty at the time, and how far he is behind deadline.

Would we need to get the permission of the syndicated author before we could trim during paste-up? What about permission concerning layout? How could we conceivably get that permission? Even if we had the time to do so--which we would not since many such decisions have to be made within minutes--where would we find the person? The syndication service may be in New York, Los Angeles, or Kansas City, while the author may reside in Florida or Alaska, or be on vacation in the middle of the Smokies. And even if we had the time to track down the person and knew where to go, imagine what it would cost.

Finally, all newspapers are generally edited with a consistent style in mind. That style is consciously chosen by the publisher and the editors to appeal to a certain audience that the newspaper is trying to reach. That audience will be composed of a certain type of person, and the demographics will vary considerably from paper to paper. With this in mind, stories are often edited in such a way as to create a stylistic whole.

What if the aesthetic taste of the reporter doesn't match the aesthetic taste of the publisher or editor? What if a reporter doesn't like the audience the newspaper is attempting to reach, and consequently the style of editing that his story goes through? For that matter, what if the reporter just doesn't like the publisher or editor? Should that reporter be able to veto the editorial judgement of the publisher or editor?

Mr. Chairman, as should be obvious, there is a profound tension between the exercise of the moral right of integrity and the business reality of publishing a newspaper. However, there is an even greater tension between the exercise of the moral right of

integrity and the legal reality of running a newspaper, and it is one which raises serious First Amendment problems.

As I indicated earlier, under typical libel and privacy laws, a newspaper publisher is legally responsible for all material published in his newspaper, and is generally the main target of lawsuits. For this reason, a publisher and his team of editors must be able to edit and revise materials without second thoughts, and at a second's notice. Simply put, a publisher and his editors must be able to control, and control absolutely, every word of every story that goes in the newspaper, and every image of every photograph. To put the editorial control of a newspaper in any individual, or group of individuals, other than the publisher would seriously disrupt the chain of ethical and legal responsibility for stories printed in newspapers. Ultimately, it would destroy the delicate balance which exists in our legal and political system among the public, the government and the press.

For these reasons, implementing a moral right of integrity in the newspaper industry simply would not work.

C. The Paternity and Integrity Rights in Advertising.

My comments so far have only dealt with paternity and integrity rights as they affect editorial products. Advertising, particularly display advertising, presents still other problems.

Imagine the problems that would arise just with the artwork alone. Every issue of a large newspaper is filled with hundreds of little drawings which appear in most display advertisements. These include generic, nondescript drawings of automobiles, tires, batteries, houses, stereos, VCRs, televisions, purses, couches, chairs, beds, mattresses, etc. In grocery advertisements, the art includes drawings of bread, margarine, cooking oil,

garbage bags, milk, meat, etc. Some are only one inch by one inch. None are signed. No credit is given. Would a right of paternity mean that the creator of each had to be identified? Further, display ads may be designed by several people working independently on copy, graphics, photography and line art. Would each contributor and artist have to be given a byline? How would we identify all? Does a copy writer get the same credit as an artist? What do we do with very small display advertisements, where the byline might be as big as the advertisement?

Would the newspaper have to receive permission to reduce the size of a drawing, or to augment a simple drawing, or combine several? Would permission have to be obtained before a black and white ad was run in color, or a color ad run in black and white? What would we do when our ad department received camera-ready copy which had no attribution on it? Refuse the ad? Track down the artist?

What would we do with clip art? Clip art is illustrative art normally licensed to a newspaper to be used to illustrate advertisements, stories, features, or whatever, and in any context. Could artists working for these services have the right to object to the use of their art in certain types of ads? How could we ever be assured that we had the right to run the art?

Mr. Chairman, today all the above questions are answered by contract. Imposing a moral right structure on the advertising industry would change that, and would open a Pandora's box that I am sure Congress would not want to open.

Thank you for considering our views. I would be happy to answer any questions.

MEMORANDUM
September 1989

AN OVERVIEW OF THE MORAL RIGHT.[1]

I. Introduction: Rights of Personality

In European legal systems, as in the American legal system, the rights of authors are protected by a wide assortment of laws. In many civil law countries, particularly France, Germany, Italy, and Spain[2], those protections encompass not only an author's economic rights and interests, but also certain personal rights and interests. This second group of rights are generally know as le droit moral, or the moral right, or moral rights. They are recognized as rights in and of themselves, and are considered enforceable apart from and in addition to authors' proprietary interests in their works.

This moral right concept is an exotic one for the American legal system. This is because the theoretical basis of the right is grounded in the "personality" of the author which, so goes the theory, is projected into the work and deserves protection by the legal system. For this reason, theorists have historically argued that the moral right is inalienable.[3] That is, it cannot be sold or given away.

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[1]This memorandum was prepared by Robert J. Brinkmann, General Counsel, National Newspaper Association.

[2]M. Nimmer, Nimmer on Copyright §8.21 (1989); see generally D. Kohs, Paint Your Wagon--Please!: Colorization, Copyright, and the Search for Moral Rights, 40 Federal Communications Law Journal 1, 8-9 (1988).

[3]E.g., Staff of Senate Comm. on the Judiciary, Subcomm. on Patents, Trademarks, and Copyrights, 86th Cong., 1st Sess., Studies Prepared for the Subcommittee pursuant to S. Res. 53, 123 (Comm. Print 1959, "The Moral Right of the Author" by William Strauss)(hereinafter Senate Committee Print). As this study notes, there has been a

(continued...)

In the United States we have no such general legal theory[4] of the "personality," nor any legal causes of action based upon psychological considerations.[5] Since we have no causes of action in this country which are per se based upon a metaphysical right of the personality, we have no causes of action which are per se based upon the moral right. As noted below, however, interests dealing with reputation are well protected by a variety of federal and state statutes, including the vast array of state libel, privacy, publicity, misrepresentation, and unfair competition statutes, as well as the federal Lanham Act and contract law.

II. Moral Rights

A. General.

The moral right generally includes:

1. The right of an author to be known as the author of his or her work, to prevent others from being named as the author of his work, and to prevent others from falsely attributing to him or her the authorship of a work which he or she did not create (the paternity right).

2. The right of an author to prevent others from making deforming changes in his work (the integrity right).

3. The right to prevent others from using the work or the author's name in such a way as to reflect on his professional standing.[6]

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[3](...continued)
tremendous gap between the theoretical European concept of the moral right and the practical fashion in which European countries actually implement it. Id.

[4]E.g., Senate Committee Print at 128 nn.72-74.

[5]Except perhaps for the torts of intentional and negligent infliction of emotional distress.

[6]Nimmer at § 8.21. Nimmer also includes as a moral right the right to withdraw a work from distribution if it no longer represents the views of the author. Other commentators have pointed out, however, that this theoretical "moral right" to withdraw a work has
(continued...)

Further, some have noted that "[t]wo other aspects of the moral right doctrine are the creator's right to prevent excessive criticism and the creator's right to relief from other assaults on his personality."[7] These rights, commentators have noted, are grounded in the individual's right to have his or her personality protected:

> To appreciate fully the theoretical basis for these two rights, one must recall that the moral right doctrine safeguards rights of personality rather than pecuniary rights. The creator projects his personality into his work, and thus is entitled to be free from vexatious or malicious criticism and from unwanted assaults upon his honor and professional standing.[8]

As should be obvious from this quotation, the degree to which questions dealing with the moral right can turn upon subjective, content-based judgments is astounding. That the moral right can be a very arbitrary and dangerous doctrine for a legal system to enforce has even been recognized by some French judges:

> The court was misled into holding that intellectual works are outside the ordinary law and above any contract. There are no two different standards of laws, one for artists, and the other for ordinary human beings. The expression [that] "despite any contract the right is inalienable," is outdated and, in any case, too general. The theory of a right in the personality has consequences which appear more and more dangerous. Let us hope that the decision in the Rouault case will not make the moral right the basis of error or whim, and that it will not be invoked in the face of a contract freely entered into."

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[6](...continued)
generally not been recognized in practice. E.g., Kohs supra note 1 at 12 citing Sarraute, Current Theory on the Moral Right of Authors and Artists Under French Law, 16 Am. J. Comp. L. 465, 467 (1968).

[7]Kwall, Copyright and the Moral Right:Is an American Marriage Possible?, 38 Vand. L. Rev. 1, 7 (1985).

[8]Id. at 7-8.

Senate Committee Print at p. 121 n.30 citing a French decision found at D.A. 1946, 121,122 (comments made in context of consideration of moral right to prevent publication).[9]

B. Integrity and Paternity.

The interests in professional and personal reputation protected by the paternity and integrity rights are protected in American law, but in a fashion quite different from that provided for under a theory of the moral right. In this country, these interests are protected through a variety of tort actions (including but not limited to misrepresentation, defamation, privacy, publicity, and a host of business torts) as well as the recently amended Section 43[10] of the Lanham Act.[11] These protections, however, for First Amendment

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[9]The Senate Committee Print notes that the Court of Appeals in Paris subsequently affirmed the decision cited in the quotation but insisted to a greater extent on contract interpretation and played down the moral right.

[10]As of November 1989, Section 43 will reach any misleading description or representation of fact in commercial speech which is likely to:

--cause confusion, mistake, or deceive;
--as to the affiliation, connection, or association of the speaker
--with another person; or
--as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.

Pub. L. 100-667, Title I, §§132, 136 (November 16, 1988), 102 Stat. 3946, 3948.

As of November 1989, Section 43 will also reach any misleading description or representation of fact in commercial advertising or promotion which misrepresents the nature, characteristics, or qualities of the speaker's or another person's goods, services, or commercial activities. Id.

[11]There are also several state statutes that focus on works of "fine art." See Nimmer at § 8.21[B][C]. The First Amendment questions raised by the distinctions made in these statutes have never been thoroughly examined.

They are very troubling. As Richard Posner very recently noted in the American Scholar:

> [T]here is no objective method of determining what is art ... When we say that lead is heavier than aluminum or that an automobile is faster than a rickshaw, we make a statement that can be verified by methods independent

(continued...)

reasons, generally focus on the accuracy and truth of the representation, and leave it up to the author as to whether he or she wishes to sell various rights in the work. Included among those rights are the right to be identified with the work, and the right to have supervision and control over subsequent modifications of the work. That is, matters of nondeceptive or non-misleading paternity and integrity are generally handled through the contractual process. A writer may contractually agree to sell the rights to a work but retain the right to be identified as its author and/or the right to supervise, control, and object to any modification. Or, he or she can sell those rights for a higher price. The choice is that of the writer.

The situation is somewhat different in Europe. There, the moral right of an author to require or object to the use of his or her name (paternity) and the moral right to prevent

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[11](...continued)
of the tastes or personal values of the people doing the verifying. . . . The problem is not that artistic value is not a thing which a work either has or has not, for in this respect artistic value is no different from weight or speed, being like them an attribute or property rather than a thing. . . . But while it is possible to make objective measurements of physical properties such as weight and speed, it is not possible to make such measurements of artistic value, because people having different values and preferences do not agree and cannot be brought to agree on how to determine the presence of that attribute or even how to define it. . . . Even if everyone to whom judges were willing to listen agrees that a work has no artistic value, we know from historical experience that it may; later generations may find such value in the work even though the artist's contemporaries did not. Conversely, a work highly valued in its time, or for that matter in later times, may eventually come to seem thoroughly meretricious.

Art for Law's Sake, The American Scholar, 513-14, Autumn 1989.

distortion of his or her work (integrity) are nontransferable rights, which--in theory--cannot be sold like contract rights.[12]

For instance, French law states:

> The author shall enjoy the right to respect for his name, his authorship and his work. This right shall be attached to his person.
> It shall be perpetual, inalienable [nontransferable] and imprescriptible.
> It may be transmitted mortis cause to the heirs of the author.
> The exercise of this right may be conferred on a third person by testamentary provisions.[13]

Under this section, there arises the spectacle of a non-copyright owner suing a copyright owner (i.e., someone who owns all the rights to a work) over a subsequent unauthorized editing of a work.

The question obviously comes to mind as to how publishing industries function under such a rigid regime. The answer is that there is a vast (although inconsistent) disparity between theory and practice in European moral right law. While theoretical statements of the moral right doctrine are almost universally cast in terms of rigid nontransferability, and are therefore consistent with the right's philosophical roots, the right in practice often is transferred or waived. This is done either directly, or indirectly through some sort of

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[12]As the Senate Committee Print noted:

> Alienation of the substance of the moral right is considered impossible in view of the nature and the purpose of the right. This approach has led some writers to the conclusion that any contract which permits acts detrimental to the author's honor must be void, because the moral right cannot be an object of commerce.

Senate Committee Print at 123 (citations omitted).

[13]Law of 1957, art. 6, as cited and translated in Improving the International Framework for the Protection of Computer Software, 48 U. of Pitt. L.Rev. 1151, 1169 (1987).

estoppel theory. Further, the codification and interpretation of the doctrine is so riddled with exceptions and overlays of fairness, reasonableness, and good faith that in practice it sometimes (but not always) functions in much the same way as the American system.[14]

Particularly interesting is the fact that German courts have held that a newspaper reporter has no paternity right in his contributions,[15] and that the British moral right excludes newspapers, magazines, and other periodicals.[16]

Regardless of how the doctrine is actually implemented in Europe (and its implementation is random and unpredictable), the underlying concept of the integrity right is philosophically and fundamentally at odds with the idea of the objective "reasonable man" standard that permeates American law. This is because a moral right of integrity, in order to be consistent with the notion of a personal right and true to its ideological essence, would have to be based upon a subjective standard. That is, judgments about the "deforming" nature of

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[14]E.g., Nimmer and Geller, International Copyright Law and Practice (1987) at 14, 27, 28, 40, 75, 82; Senate Committee Print at 124-125.

As one French commentator has noted:

> The inalienability of the moral right is proclaimed by numerous lower court decisions and by certain textwriters. It seems to us, however, that application of this statement, without further qualification, would lead to impossible and inequitable results which, in the last analysis, would be contrary to the interests of the author. . . . It appears that, where the author has made an express contract, he cannot invoke his moral right where it is contrary to such contract.

Senate Study at 123 citing Plaisant, Le Propriété Littéraire et Artistique, Extrait du Juris-Classeur Civil Annexes (1954), fasc. 8 No.7 (emphasis added).

[15]Senate Study at 118 n. 16, citing Gewerblicher Rechtsschultz und Urheberrecht 1953, 499.

[16]Copyright, Designs and Patents Act, 1988 C. 48 §§ 79(5)-(6), 81(3)-(4). Apparently, the French right also excludes newspapers and magazines. See Senate Committee Print at 124 n.50 (little or no integrity right in French collective works).

changes would have to be based upon the creator's subjective perception as to whether his or her artistic integrity has been compromised, regardless of whether a reasonable man (or reasonable author or creator) would agree. To be consistent with the basic moral right philosophy, the integrity right--being a personal right--would have to turn on whether the sensibilities of the creator are offended in his own mind and soul, and not upon whether the creator's reputation has been diminished in the eyes of society.

As one French court has noted:

> The concept and execution of literary and musical works are solely a product of the personal intellect; such works are the expression of the author's genius and part of his personality. The author is sole master of his thought and controls the conditions and the extent to which he wants to disclose them. He is, therefore, sole judge to decide whether or not, when, under what condition, his work should be published, . . .

Senate Committee Print at 121 citing Dame Canal v. Jamin, Civ. Trib. Seine, April 1, 1936, D.H. 1936, 262 (first publication case)(subsequent citations omitted).

Thus, under the theory of moral integrity, one could find a situation where a modification of a work actually enhanced the reputation of an author (as measured in terms of critics, fellow authors, and perhaps the mass market) but was artistically offensive to the individual author. In such a situation, a consistent integrity theory would give the creator the right to object to the modification, even if he or she had sold all rights in the work. Again, it needs to be pointed out that in practice this might well not happen because of the various "reasonableness" and "fairness" overlays to the doctrine. On the other hand, it could just happen because the European civil law courts are not bound by the legal doctrine of stare decisis, as are American common law courts.

28-054 - 90 - 23

Finally, among the most troublesome questions that the moral right raises is whether a creator can object to the context in which his or her work is displayed or distributed. For instance, one case involved the composer Shostakovich who objected to the use of his music in a film whose theme ran counter to the composer's political beliefs, even though there was nothing in the film to associate the film with the composer's beliefs.[17]

In another case, a Dutch court enjoined the publication of a children's book because the illustrations furnished by the publisher were not of the same "superior" quality as the text.[18]

In the newspaper context, this could take the form of having a writer object to having a story appear next to some other story or next to some illustration. Alternately, an author could object to an article appearing next to certain advertisements.

C. Rights Other than Paternity and Integrity.

The interests protected by those moral rights other than paternity and integrity that were listed in section A above (i.e., the right to prevent "excessive" criticism, to prevent assaults on personality, and to prevent harm to professional standing through the use of the author's name) are generally protected in American law only: 1) to the degree that false statements of fact are involved, and to the degree--if a public figure is involved--that those false statements of fact are also uttered in reckless disregard of the truth or falsity of the matter; and 2) to the degree that, particularly for the third right mentioned above (harm to professional standing

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[17]Senate Study at 139. Compare Shostakovich et al. v. Twentieth-Century Fox Film Corporation, 196 Misc. 67, 80 N.Y. Supp 2d 575 (1948), aff'd by memorandum opinion, 275 App. Div. 692, 87 N.Y. Supp 2d 430 (1949) with Soc. Le Chant du Monde v. Soc. Fox Europe and Soc. Fox Americaine Twentieth Century, Ct. App. Paris, Jan. 13, 1953, D.A. 1954, 16, 80.

[18]Nimmer & Geller at 45, citing Pres. Dist. Ct. Utrecht 27 Nov. 1975.

through use of the author's name), contractual rights or rights of privacy or publicity are violated.

Generally, this is due to the First Amendment philosophy that the worth of ideas in a democracy must be determined through competition in the marketplace of ideas. Central to that inquiry is the belief that a full and robust examination in the marketplace means subjecting ideas to the rough and tumble process of spontaneous critique and unfettered criticism, a process intrinsically at odds with theories philosophically rooted in a concern for statements which are truthful but constitute "excessive criticism" or "unwanted assaults" on the personality. As Chief Justice Rehnquist recently noted:

> Justice Frankfurter put it succinctly when he said that "[o]ne of the prerogatives of American citizenship is the right to criticize . . . Freedoms of expression require breathing space."

Hustler Magazine v. Falwell, -- U.S. ---, ---, 108 S.Ct. 876, 879-880 (1988)(citations omitted).

Summary of Testimony of R. Jack Fishman, September 20, 1989
on behalf of the National Newspaper Association
before the Subcommittee on Patents, Copyrights & Trademarks
of the Judiciary Committee of the United States Senate

Mr. Fishman is publisher of the Citizen Tribune, a 24,000 circulation daily newspaper in Morristown Tennessee, and President of Lakeway Publishers, Inc., which owns six other small newspapers in Tennessee. The National Newspaper Association represents more than 5,000 small daily and weekly newspapers throughout the country. Founded in 1885, it is the oldest and largest national trade association in the industry.

Mr. Fishman's testimony addresses the issue of moral rights and the newspaper industry, and opposes their introduction into this country. It does not address the issue of work-for-hire, nor S. 1253. Attached to Mr. Fishman's testimony is a brief overview of the doctrine of moral rights.

The doctrine of moral rights in a European legal dogma that gives a creator of a product certain unalienable rights in his product. Included among these are: 1) the right to be identified with the product (the paternity right), 2) the right to prevent deforming changes in a product (the integrity right), 3) the right to prevent others from using the product or the creator's name in such a way as to reflect upon professional standing, 4) the right to prevent excessive criticism of the creator, and 5) the right to relief from assaults on the creator's personality. Under the doctrine, a creator would retain these rights even after he has sold his product.

NNA believes that imposition of a system of moral rights in the United States would be incompatible with the continued existence of the publishing industry as we know it today. Under such a doctrine, the newspaper industry could not continue to do business and serve the public in the same fashion that it has for decades.

Newspapers consist of stories put together by many individuals. It is not always easy to determine, under the time pressure of deadlines, and after the final editing process is over, exactly "who" are the authors of many stories. If the paternity right were applied to newspapers, a publisher would have to determine exactly who was the "author"(s) of each and every piece in the paper, and credit that person. This would be a very difficult task, and would consume a great deal of time. Also, the publisher could be sued by those who felt they should have been in a by-line but were not included; and he could be sued by those put on the article if they felt that others who had been credited in the by-line did not deserve it.

Under the moral right of integrity, writers would retain the ability to veto edits of their stories they did not like. This would mean that publishers would have to "clear" every story with all the authors of the piece. This would create an unacceptable conflict between reporters and editors. Also, the dynamics of always working on deadline would create an unreconcilable conflict between the need to get out the news and the process of negotiation that would evolve over who is credited with what, and what changes could or could not be made.

Finally, under a moral rights regime, final legal responsibility for the contents of a newspaper would rest in the hands of the publisher, but a final control of the editorial product would shift out of his hands. This would place the publisher in an untenable position since he would not be able to exercise the strict editorial control and oversight necessary to minimize exposure to lawsuits over items published in his newspaper.

Senator DECONCINI. Thank you, Mr. Fishman.

Mr. Kovner, let me ask you this. You raised a question that if there are checks which are stamped on the back which someone signs, and they also sign at the same time a work for hire agreement—I agree with you that they probably are illegal, but if that is the case, is it your position then that the artist who endorses that check still owns all the intellectual and moral rights to whatever they're getting paid for?

Mr. KOVNER. Briefly, the answer is yes, Senator. Under the Copyright Act, absent an agreement in writing, only one-time rights are conveyed. The check endorsement stamp does not constitute an agreement in writing as a matter of law, so at that point the artist still has all rights.

Senator DECONCINI. Notwithstanding that, you get to the problem where you've heard the testimony here—I must admit that maybe the witnesses we've had can't be called the little guys, but they were once upon a time, I think—you see examples of the disadvantage in the bargaining that many artists have. I know some who have complained to me about it, I suspect similar to what Senator Cochran had in his statement this morning. They asked for additional protection in this legislation.

I guess the question that I have for all of you, as objective as you can be and I realize that's difficult because you have a very important position to protect and represent here, but No. 1, what does Congress do to protect that little guy?

No. 2, is S. 1253 really that onerous in trying to protect that little guy, assuming you think there may be some need for protection?

Mr. KOVNER. I think S. 1253, if I may, Senator, doesn't really help the little guy. I think the entire approach is against the interest of freelancers. It sort of forces companies to move a lot of this important, valuable, creative contribution in-house to full-time employees. I think it is in the interest of freelancers, whom we believe play a major role, that they have maximum flexibility in terms of the kinds of rights that may be offered. We think it's helpful that they join their respective trade associations. They are much stronger than they have ever been in the past. For example, photographers today seldom grant all rights, and there is nothing in this bill that would prevent them from granting all rights.

This bill really doesn't deal with their problems, and I submit it is against the interest of freelancers.

Senator DECONCINI. Well, you heard just the opposite there by some witnesses, that they think it would protect those they are representing, as well as freelancers.

Mr. KOVNER. I have to respectfully disagree.

Senator DECONCINI. Anybody else care to comment on that? What do you do to protect the little guy?

Mr. KLIPPER. Regarding S. 1253 itself, I think we have to ask, what would it do? I think in the formal salaried area, as we indicate, there will be many instances where the push toward formal salaries, as Mr. Kovner has said, could not be met because, for example, in the educational textbook area there may be hundreds or even thousands of individuals who make those contributions. It would be hard for those to be absorbed by these publishers.

In addition, a contributor—someone who acts as an independent contractor—doesn't want to go on board because he loses the attributes that make him appealing to the publisher in the first place. He is no longer on the school campus or in the school with the students, gaining constant knowledge about what's going on in school.

So I think there is a problem there. There will be a push here for formal salaried, but it will be unable to be met in a number of instances, and that will be a problem. The less opportunities, the less room for creative input.

Senator DECONCINI. But quite the contrary, it appears to me that the freelance artist is going to do his or her work, probably no matter what, because I believe so many of them are motivated toward production of the work because of that intellectual capacity which they have.

Once they've produced the work, then they're in the market flow, subject to what appears to be pretty heavy economics against them. I'm not talking about someone who has an association or established practice, like Mr. Clancy or others who have the resources now. I'm talking about protecting that intellectual property at its birth and as it is nourished along.

You apparently disagree that there are any disadvantages, is that right? Or that S. 1253 would enhance their situation?

Mr. KLIPPER. I think that S. 1253 would cause problems in the marketplace. I think there would be an influx of litigation, as we talked about. And I think there are, as I mentioned earlier, multiple work agreements would be ended.

So I do think it's not at all as clear a picture as was painted by the other side.

Senator DECONCINI. Senator Hatch.

Senator HATCH. First of all, the thing that bothers me about work for hire is that it seems to only work in favor of the producer who is commissioning the person to do the actual work.

Let me just ask you, if S. 1253 were enacted, would a publisher be able to commission any freelance work or piece of work, or any work for hire on a basis apart from the second paragraph of the bill, those nine categories of collaborative thought?

Mr. KOVNER. Let me begin by just emphasizing that we should keep in mind that this bill does not prevent a grant of all rights, which is principally what the witnesses were urging. Merely using a work for hire format doesn't mean that you cannot, within the same agreement, give back many portions of rights, so that the commissioner in effect acquires only some rights. The only difference between an all rights assignment is what I referred to as the termination transfer; that is, the ownership of the rights after the 35th year, and whether they revert. That's really the only economic difference between an all rights transfer, and they are not seeking—or have not sought today—a bar on the sale of all rights in the materials. And I would urge that they not seek it, because it is important that there be maximum economic flexibility in order to encourage expansion of literary rights and artistic rights.

Senator HATCH. But doesn't the possibility of obtaining an all rights transfer from the writer or artist provide sufficient flexibil-

ity for publishers to purchase all of the rights that they truly need, even with this bill? That's your point?

Mr. KOVNER. That is a very good question, but there is a perfectly valid reason for the publisher to seek to be the copyright proprietor. If in fact, on a variety of circumstances—take fashion photography, where a distinguished fashion magazine is approached by a leading clothes designer to have photographs taken for that particular magazine, and the magazine pays for the model and sets up the entire shoot and the photographer simply comes in and takes the shoot. That photographer will argue that he or she is the true author, but we submit that under those circumstances they are merely contributors, and that there are other creative elements that go into that end product.

So there are perfectly valid circumstances under which the copyright proprietor ought to be the commissioning party. It isn't in every instance, but it is in many instances.

Senator HATCH. Let me just move to the moral rights area in the publishing field.

When we held hearings on the subject last year with reference to visual artists—it was last summer, as I recall—we heard very convincing testimony to the effect that moral rights concepts often were not enforced in those European countries that originated them to begin with, where they actually emerged. It seemed to me that the exceptions recognized to the moral rights laws recognized in Europe largely swallowed that particular rule.

Does anybody agree or disagree?

Mr. FISHMAN. I'm sorry, I didn't understand the last phrase, Senator.

Senator HATCH. Well, these moral rights were developed in Europe, yet there were exceptions developed that basically swallowed the rule. That's how it appears to me.

Mr. FISHMAN. I think, Senator, that you are probably very much aware of the difference between American law and continental law. I think that speaks to the various issues. I think that the moral rights that are not being enforced in Europe—the fact of the matter is, in several of the countries that say that they have—really has basically to do with—one of the main reasons they're prospering or not is what I've said earlier. The business reality creates one problem of actually putting out a daily newspaper on a timely basis. But also, there are a great many legal questions involved on the way we put out newspapers as far as responsibility and that type of thing is concerned.

I think that it also raises some very serious questions about first amendment issues that you would need to consider very carefully because in the countries that presumably have moral rights, they don't have the first amendment to the Constitution of the United States. In our particular case, we've always espoused more expression and freedom of expression and these kinds of things. I think this moral rights type of thing stifles that rather than contributing to it.

Mr. KLIPPER. Senator Hatch, just a few quick points.

I know that Mr. Veliotes is probably going to point to the fact that the paper he submitted by three copyright experts addresses

that question in some detail. Let me mention a few, and perhaps the Ambassador would like to follow up.

First of all, when we talk about the European experience we have to think carefully about whether or not it really has been benign in its effect on copyright industries abroad. I think there is reason to indicate, given the fact that moral rights injects uncertainty into the marketplace, that there may well be an adverse impact on those industries. In fact, last year when your sister subcommittee on the House side went to Europe during the Berne debate, they were told by producers of motion pictures that in their view there was an adverse impact on the European film market. So I think we have to be concerned at the outset over what has happened abroad and not accept too easily the fact that it has worked in those countries.

Second, I think it is important, as Mr. Veliotes' paper points out, that virtually without exception in the European countries, moral rights has developed hand-in-hand with the whole copyright law in those countries. Without exception—or perhaps rarely—have they ever been imposed in a country such as ours, where there has been a copy right law for a hundred years or so, and there has been a long-term experience with first amendment freedoms and other aspects that are lacking.

So I think there is a very serious question here about how you suddenly transplant those rights, no matter how they worked in fact, to the United States.

In my testimony I indicate that there may be discussion here today—but of course, there was not—that the European experience was such that it could work here. In my view, that begs the question. The real question is how those rights would work in this country, given our own unique system, attributes, and particularly first amendment concerns, when you would inject such great uncertainty into the marketplace.

Mr. FISHMAN. I have nothing to add to that.

Senator HATCH. All right, thank you.

That's all I have, Mr. Chairman.

Senator DECONCINI. Senator Cochran, do you care to ask any questions?

Senator COCHRAN. Mr. Chairman, just one brief observation. I really appreciate your calling on me.

I didn't expect to ask any questions of this panel, but it seems to me that if there is a question about the efficacy of a purported agreement on the back of a check and its legality or illegality under State law, that we certainly ought to clarify that under Federal law, since it's the Federal law that is the subject of the hearing.

I also assume, then, from the comments by this panel that there would not be any objection to the Federal law clearly stating that agreements that are part of an endorsement process on a negotiable instrument could be banned as a matter of Federal law.

Those are observations that I have that I think come from the testimony that we've heard from this panel.

Senator DECONCINI. Gentlemen, thank you very much. We appreciate it very much.

Mr. KLIPPER. Mr. Chairman, one moment, please. I'm sorry.

Given the number of statements that were handed in, that were received yesterday, we would like to have time to respond because there were a number of assertions that I think are worthy of comment.

Senator DECONCINI. The record will remain open for two weeks. You can add any testimony or additional information.

Mr. KLIPPER. That will give us a chance to review the statements. Thank you.

Senator DECONCINI. The committee will stand in recess, subject to the call of the Chair.

[Whereupon, at 11:45 a.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

ADDITIONAL SUBMISSIONS FOR THE RECORD

Society of Illustrators

128 East 63rd Street
New York, N.Y. 10021
212-838-2560

The Honorable Dennis DeConcini, Chairman
Senate Subcommittee on Patents, Copyrights and Trademarks,
Senate Committee on the Judiciary, United States Senate
Washington, DC 20510

September 19, 1989

Dear Mr. Chairman,

We are pleased on behalf of the Society of Illustrators of New York to address this committee. The Society of Illustrators represents a nationwide membership of 800 artists. For 80 years, the publishing industry has depended upon our members for the highest standards of illustration.

At our headquarters building in New York, we maintain a public museum of illustration, the major repository of this distinctly American art form. The Society of Illustrators has established a traveling exhibit to schools and museums that reflects to the world American culture and democracy. We provide a student scholarship program, perform educational and community services, and maintain an unsurpassed forum for professional exceilence around the world.

Illustration is the most universal and conspicuous art form in the world today. Commerce depends upon it to enhance, visualize and sell products. Illustrations are commissioned and defined by the commissioner to be appropriate for a subject. This directive, however, does not constitute creation. Any number of illustrators taking the same directive would produce as many different works of art. Solving the problems of others against tight deadlines makes it more demanding than other art forms. The most innovative artists in America today are illustrators. At a time when modern gallery art lacks direction and force, illustration forms the cutting edge of visual communication by constantly changing and finding new scope.

Illustrators depend upon the strength of the Copyright Law for survival as a profession. The Work for Hire provision of the Copyright Law, misused by our clients and misinterperted by the courts, is causing us great harm. We urge Congress to clarify its intent and prevent further abuse.

Publishers negotiate from a powerful economic advantage over individual illustrators. Reputable publishers do not press this advantage and enter the negotiation with fairness and understanding of our mutual contributions. But unethical clients take advantage of their economic power by coercing artists to sign away the rights we believe Congress intended for us to keep, namely "authorship" and the right to control the reproduction of our creations.

A professional self-employed artist, writer or photographer has spent years developing the special skills to create images. To allow a company of marketers, editors and typesetters to claim that creation is absurd. No matter how much a company claims its direction, the artist alone possesses the talent and skill to create the work. Why else would an artist be hired? The Work for Hire provision is being misused to rob artists of ownership and recognition for their work.

We do not get paid overly well, but if we create an exceptional work of art, it may be requested by other clients for reproduction elsewhere. Some works are reused many times in diverse and unanticipated markets. The creators of these images should benefit financially from the fees paid for further uses, but Work for Hire prevents this, as ownership and control of reproduction have been seized by a company. Work for Hire allows a publisher to remove the artist's name from his creation, to alter the work without his knowledge or consent, and to profit from its resale to anyone, without regard, without informing or rewarding the person who created it.

We object to the undermining and violation of the rights we feel Congress intended to guarantee in the Copyright Law. We are not, as the Constitution promises the "useful arts", being secured the "exculusive rights" to our creations. We urge that the Work for Hire provision be limited to those traditional employees with employment benefits, supplied materials and workplaces, and salaries from which taxes are withheld...and not be permitted to extend to independent contractors. We encourage this Congress to clarify the Copyright Law to the extent that the judicial system will interpret it without the confusion that has pervaded its decisions. This confusion forces artists to maintain expensive legal battles, most recently to the Supreme Court, to establish their copyrights.

We urge you to establish single ownership of copyright and not allow it to be split by joint ownership. Joint ownership would quickly be substituted for Work for Hire. Like the baby, King Solomon could not split, copyright cannot be divided. We ask Congress to level the playing field for our negotiations. We need clear ownership of rights as we bargain with those who would take advantage of raw economic power to seize those rights without compensation.

Thank you for your attention, we respectfully conclude our remarks. We would be happy to respond to any questions of members of this subcommittee.

Respectfully submitted,

Diane Dillon, President
Society of Illustrators

Carol Donner, Chairman
Legislation Committee

Encl:

Ligature

This letter of agreement commissions you to prepare and deliver to

Ligature, Inc. _____

for delivery by Ligature to _____("Client")

for _____(the "Assignment")

The work to be prepared by you shall be considered work-made-for-hire to the extent permitted by the copyright law of the United States, and all rights of ownership and authorship in the work throughout the world shall vest in Ligature, Inc. or its client.

You shall neither retain nor make any proprietary or other claim to any materials or services contributed or rendered to the Work, and you agree that Ligature, Inc. owns any and all rights in such Work for use in all media or in other works, including derived works, and the right to copyright the same in its own name, or in the name of its assignees, for the original copyright term and renewal and extensions thereof.

Ligature, Inc. may use, change, add to, or delete from any material contributed by you and you are not entitled to any authorship or other credit in connection with the use of the results of this assignment.

Further, this agreement is made with the understanding that the material you prepare will not infringe on any copyright or personal or proprietary rights of others.

You will be paid a fee agreed upon by you and Ligature, Inc. upon satisfactory completion of your work in accordance with the terms and conditions of Ligature's purchase order or the assignment.

Sincerely,

The undersigned is over the age of 21.

_____ by _____

Accepted

_____ _____

Date Ligature, Inc.

Chicago St Louis

ROBERT A. BECKER, INC. • ADVERTISING • 822 THIRD AVENUE • NEW YORK, N.Y. 10017 • (212) 682-3900

March 31, 1978

Ms. Carol Donner
145 East 52nd Street
New York, New York 10017

Dear Ms. Donner:

Prior to January 1, 1978 all work specially ordered or commissioned for use as a contribution to a collective work was automatically classified as a "work for hire". The Federal Copyright Act of 1976 now requires an executed written agreement. In order to avoid having every purchase order signed or having separate agreements executed with each order, we have devised a master agreement which will be applicable to all materials produced in the future. Purchase orders will continue to specify the work to be performed and the price which would have been agreed upon at the time.

Kindly date and execute both copies of this agreement and return one to my attention.

Very truly yours,

Arthur Friedman
Vice President - Finance

RAB

WORK FOR HIRE AGREEMENT

AGREEMENT made as of the date indicated below between ROBERT A. BECKER, INC. (hereinafter referred to as RAB) of 622 Third Avenue, New York, New York and

CAROL DONNER of 145 East 52nd Street,

New York, New York 10017 (hereinafter referred to as SUPPLIER).

WITNESSETH:

WHEREAS, RAB, as an advertising agency representing various pharmaceutical companies desires to purchase necessary artwork, photography and other creative property and services; and

WHEREAS, RAB seeks to establish its right to the continued and exclusive use of such property and services; and

WHEREAS, SUPPLIER has the necessary expertise and ability to create or perform the desired result.

NOW, THEREFORE, RAB and SUPPLIER agree as follows:

1. SUPPLIER will furnish specifically commissioned artwork, photography or other property or services which are the subject of a RAB purchase order.

2. All such material hereinafter produced or commissioned by RAB shall be deemed to be "work for hire" and as such all copyright, ownership shall thereby vest with RAB, its clients, and their assigns and licensees.

3. RAB shall compensate SUPPLIER for all services rendered pursuant to agreement reached at the time each specific service is requested and confirmed by purchase order.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by a duly authorized representatives of the day and year first above written.

Dated: _____

ROBERT A. BECKER, INC.

By: _____
Vice-President - Finance

By: _____

ROBERT A. BECKER, INC. • ADVERTISING • 622 THIRD AVENUE • NEW YORK, N.Y. 10017 • (212) 682-9900

April 25, 1978

Ms. Carol Donner
145 E. 52nd Street
New York, New York 10017

Dear Ms. Donner:

Several weeks ago we submitted a "Work For Hire Agreement" for your signature. It was explained that the Federal Copyright Act of 1976 made it essential for us to obtain an executed agreement. To date, we have not received a copy of the signed agreement.

In compliance with the request of our clients we will be unable to continue to do business with anyone not covered by a "Work For Hire Agreement". Unless, such agreement is received within seven (7) days from the date of this letter we will have no choice but to discontinue your services.

Very truly yours,

Arthur Friedman
Vice-President - Finance

AF:res

cc: D. Chorney
J. Siskind

CBEMA

September 20, 1989

The Honorable Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights, and Trademarks
U.S. Senate
Washington, D. C.
20510

Dear Mr. Chairman:

Enclosed please find copies of the statement of the Computer and Business Equipment Manufacturers Association (CBEMA) on S. 1253, legislation amending the work for hire provisions of the Copyright Act of 1976.

We would appreciate it if you would include our statement in the hearing record.

Thank you.

Sincerely,

John L. Pickitt

John L. Pickitt
President

enclosures

Computer and Business Equip ... ufacturers Assn. 311 1st St., N.W. #500, Wash. D.C. 20001 (202) 737-8888 Fax: (202) 638-4922

CBEMA

Computer and Business Equipment Manufacturers Association
311 First Street, NW, Suite 500 • Washington, DC 20001 • 202/626-5757

STATEMENT OF

COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION
BEFORE THE SENATE SUBCOMMITTEE ON

PATENTS, COPYRIGHTS AND TRADEMARKS

HEARING ON S. 1253,

LEGISLATION AMENDING THE WORK FOR HIRE PROVISIONS OF

THE COPYRIGHT ACT OF 1976

The Computer and Business Equipment Manufacturer's Association (CBEMA) appreciates the opportunity to submit a statement on S. 1253, a bill to modify the "work for hire" and "joint work" provisions of the Copyright Act of 1976. CBEMA opposes this legislation because the proposed changes in copyright law would be a significant disincentive to the creation of computer hardware and software programs, would discourage hiring of engineers, designers, writers and graphic consultants, and would threaten U.S. international competitiveness. As Congress made clear when the Copyright Act was enacted, the law represents a "carefully balanced compromise" that should not be disturbed.[1]

CBEMA represents companies on the leading edge of American high technology in computers, business equipment, and telecommunications. Our members had combined sales of more than $230 billion in 1988, representing nearly five percent of our nation's gross national product. CBEMA members employ more than 1.7 million workers.

Each year, CBEMA companies invest billions of dollars in the creation and dissemination of thousands of copyrighted works, including software programs, instructional manuals, research journals, and promotional and advertising materials. In creating and distributing these works, CBEMA members often hire and use the work of

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[1] S. Rept. 94-473, p. 104.

temporarily employed engineers and software designers as well as their own, full-time
employees. In addition, CBEMA members often acquire from third parties the rights in copyrighted works produced by independent contractors as works made for hire.

A brief description of the process of creating and marketing a typical computer software program that functions in a computer manufactured by CBEMA members will illustrate the importance to the computer industry of the work for hire provisions of the Copyright Act:

Developing a software program, such as a word processing program, can require the participation of hundreds of employees and consultants, including engineers and designers. Engineers inside the company come up with the initial design and then ask outside designers and programmers to review and critique the program, help work out bugs, and produce special effects such as screen displays. Once the program is created, a manual must be written and illustrated to make this hypothetical program understandable to consumers. Writing and producing such a manual typically requires the participation of in-house writers, graphic artists, photographers and engineers, as well as outside contractors that specialize in publishing software manuals.

After the software program and the manual are completed, a marketing and advertising strategy must be developed and executed, requiring the creative contribution of copy writers, photographers, film crews, editors, many of whom are employees of CBEMA companies and others still who are outside contractors.

During each of these stages, outside consultants are often brought inside the manufacturing company, either hired temporarily or given office and laboratory space and other support services.

In short, the process of producing and marketing new computer technology is replete with work for hire arrangements and collaborative creative efforts. American

computer manufacturers support this creative and entrepreneurial means of production in part because U.S. Copyright law ensures that a company which invests in hiring outside consultants to help create a new computer program will retain control of the program's copyright and the copyright for the instructional manual. In simple terms, if a company takes the risk of investing millions of dollars in the development of a new software package, the Copyright Act assures the company that it will be the beneficiary of any gains made on its investment.

Due to the inherently collaborative nature of computer manufacturing in the U.S., without work for hire rules that allow manufacturers to retain copyright control when they use outside contractors, computer manufacturers would likely be confronted with numerous claims of co-authorship made by outside consultants each time a new product began to return profits. As a result, in order to avoid skyrocketing litigation costs and to ensure that they could retain the copyright in a new product, computer manufacturers would be constrained to keep all work in-house, to ensure that only traditional, long-term, salaried employees helped produce a typical program and manual. Such a result would significantly impair the creative and cooperative nature of the U.S. computer industry -- a dynamic that has helped make American high technology companies world leaders.

That is why CBEMA is constrained to oppose S. 1253. Under the proposed legislation, a computer manufacturer could only retain control of the copyright for a new product if the product was produced solely by salaried employees. This test contradicts the original intent of Congress in enacting the work for hire provisions of the Copyright Act and rejects the test set out by the Supreme Court only three months ago in its ruling in Community for Creative Nonviolence v. Reid.[2]

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[2] Community for Creative Non-Violence v. Reid, __ U.S. __, No. 88-293 (June 5, 1989).

Under section 101 of the Copyright Act, a manufacturer can only retain control of copyrighted product if the product is a work made for hire produced by its employees, or if the work for hire product falls within nine enumerated categories.[3] Most products, including computer programs, do not fall within the nine categories, so manufacturers depend on a fair definition of the term "employee" as a means of maintaining control of the copyrights for products made by their companies.

Since the major revisions of U.S. copyright law made in 1976, there has been considerable disagreement about the appropriate definition of the term "employee" under the work for hire provisions of the Act. Much rests on the definition. The debate over the meaning of this term is more than an academic exercise in parsing words. The meaning of "employee" under the work for hire rules determines who retains control over the copyright for a new product and significantly affects business relationships in the high technology industry.

CBEMA supports the widely regarded interpretation of this important term handed down by the Second, Fourth and Seventh Circuit Courts of Appeals, and argued for this construction of the term "employee" before the Supreme Court in the Reid Case. According to the Second, Fourth and Seventh Circuits and most legal scholars in the copyright field, a work is prepared by an employee under Sec. 101 of the Copyright Act if the hiring party actually wielded control with respect to the creation of a particular work.[4]

This test served the computer industry and its inherently cooperative and creative culture well. Under the "actual control" standard, a computer manufacturer could call in consultants for their expertise in specialized fields, while supervising and

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[3] 17 USC 101.

[4] Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548, cert denied, 469 U.S. 982 (2nd Cir. 1984); Brunswick Beacon v. Schock-Hopchas Publishing Co., 810 F.2d 410 (4th Cir. 1987); Evans Newton, Inc. v. Chicago Systems Software, 793 F.2d 889 (7th Cir. 1986), cert. denied, 479 U.S. 949 (1986).

actually controlling the overall research and development of a new product, without losing control of the copyright in the new product in which the firm had invested so much. Put simply, under the "actual control" rule, temporary employees could not attempt to wrest control of the copyright in a successful new computer product away from the manufacturer simply because the consultant was hired to work only on that project. Instead, the manufacturer that invested in the research and development, hired the consultants, created work for its employees, supervised the team developing the product, and took the financial risk of investing in new technology was permitted to retain control of the copyright because the firm exercised "actual control" over the product.

While CBEMA continues to believe that Congress originally intended that the "actual control" standard apply, the Supreme Court modified the "actual control" test in Reid and chose to adopt a definition of "employee" based on the law of agency. While CBEMA preferred the original "actual control" test which had been held in such high regard in the copyright community, the new standard handed down in Reid should not significantly disrupt business in the computer industry.

Under Reid, in determining whether a hired party, such as an individual hired temporarily to work on a new software program, a manufacturer's control over the creation of a product is considered along with other factors. Also considered are, the location of the work, the duration of the relationship between the worker and the manufacturer, whether the work is part of the regular business of the hiring party, and the discretion of the worker over when and how long to work.[5] Although CBEMA argued that these added considerations were unnecessary, computer manufacturers accept the Court's decision and can function under it.

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[5] Community for Creative Non-Violence v. Reid, __ U.S. __, No. 88-293, slip op. at 20 (June 5, 1989).

Just three months after the Supreme Court handed down this new standard, however, the proponents of S. 1253 are asking Congress to flatly reject and overrule the Court's decision and in its place to adopt a rule that would seriously disrupt business practices in the computer industry by making it nearly impossible to hire temporary engineers, designers and creative consultants. S. 1253 proposes a new, extremely narrow standard that was specifically rejected by the Supreme Court, enjoys little support in the copyright community, and is contrary to the original intent of Congress in enacting the work for hire provisions.

Under S. 1253 if a manufacturer hopes to retain control of the copyright for a new product only formal salaried employees can work on developing a new product. Calling on outside consultants, scientists, and designers to help develop a new product, as is the widespread practice in the computer industry, would expose a manufacturer to numerous legal claims for control over the copyright for a new product in which it has invested. The practical effect of S. 1253 is that computer manufacturers would be compelled by the proposed new standard to cut off the practice of using freelancers and outside consultants -- a result that could change the entire entrepreneurial and collaborative culture of the high technology industry for the worse.

In rejecting the standard proposed in S. 1253, the Supreme Court found that the "salaried employee" approach finds little or no support in the legislative history of the Copyright Act.[6] The Senate Judiciary Committee rejected exactly this same approach nearly 30 years ago during the debate that ultimately led to the enactment of the 1976 Copyright Act.[7]

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[6] Reid, __ U.S. __, No. 88-233, slip op., n. 8, at 11 (June 5, 1989).

[7] B. Varmer, Works Made for Hire and on Commission, Studies Prepared for the Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, 86th Congress, Second Session 127, 141 (1960).

If works in which independent contractors participate are denied treatment as works made for hire, the resulting fragmentation of ownership and control of copyrights would be a strong disincentive to computer manufacturers to make the investment necessary to bring creative individuals together and provide facilities in order to create and disseminate new products. With such a disincentive, independent contractors and freelancers would be hired far less often. That would be to the detriment of freelancers and to the detriment of the creative process. Moreover, fragmentation of ownership rights would be compounded again and again as successive new versions, editions and updates of computer products are produced.

CBEMA opposes S. 1253 due to the disruptive and anticompetitive effects of the proposed work for hire provisions. In addition, CBEMA opposes the proposed changes made by S. 1253 in the definition of "joint works" under the Copyright Act.

Under the Copyright Act, the authors of a joint work are considered co-owners or tenants in common of a copyright.[8] S. 1253 proposes an unworkable and inappropriate definition of joint works.

The Copyright Act defines "joint work" as a "work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of unitary whole."[9]

The first change proposed by S. 1253 would require that each joint author's contribution be original or copyrightable. In other words, in order to establish joint ownership of a copyright, an individual working on a collaborative project would have to identify exactly what he or she contributed to the project and demonstrate that the expression was copyrightable. This test would be nearly impossible to implement in the computer industry. Hundreds of engineers, designers, and creative consultants

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[8] 17 USC 201(a).

[9] 17 USC 101.

contribute to the creation of the typical computer product. It would be nearly impossible to document which consultant contributed which piece of the work in this wide-open process. For instance, in our hypothetical example describing the process of creating and marketing a new software package, it would likely be impossible to trace whether a change in the computer program was the result of a recommendation by an in-house software engineer or an outside consultant working on the consumer instruction manual who determined that a particular aspect of the program was not "user friendly." The joint authorship provisions of S. 1253 could potentially set off hundreds of these "chicken and egg" disputes.

In addition to being impractical, if this new definition were enacted, the need to record and quantify each contribution made in the collaborative process of creating a new computer product would create a bureaucratic nightmare that would cause the creative process to grind to a halt.

The authors of the proposed amendment to the joint work provisions may have had the relatively simple circumstances of the Reid case in mind. In Reid a single artist worked with a single commissioning agent on the design of a piece of sculpture. But, the proposed rule would simply be unworkable for computer products which are typically the products of endless brainstorming sessions among hundreds of employees and consultants. Computer products are complex and so is the means of producing them. The simplistic approach proposed in S. 1253 is inappropriate for the computer industry.

The second amendment proposed to the joint work definition is equally problematic and unworkable. S. 1253 would require individuals collaborating on a product to agree in writing and in advance of commencing the work that the work is to be considered a joint work. Like the other provisions of the bill, this provision ignores

the practical realities of the creative process in the computer industry and other industries.

The creative process in the computer industry can be analogized to a giant brainstorming session. In some cases, a computer manufacturer will call together its employees and outside consultants for the specific purpose of generating ideas that will lead to the creation of a specific product. Just as frequently, however, the brainstorming process is initiated without a specific product in mind and on occasion even collaborative efforts to produce one specific product will give birth to three, four or five collateral ideas for new products. In this context, it makes little sense to require joint authors to express their intention to create a joint work in writing before the creative process begins. In many cases in the computer industry, it is simply impossible to anticipate when the creative process leading to the creation of a new product is going to begin. The proposed legislation would have the unnecessarily burdensome effect of requiring a writing before any creative exchange can take place.

CBEMA respectfully urges the Committee to reject S. 1253 and preserve the incentives for the creative exchange of ideas in the high technology industry. S. 1253 disturbs the careful balance set out in the Copyright Act between producers and creators. Finally, the bill would severely impair the creative process in one of the United States' most successful industries -- the high technology industry.

AAAA
American Association of Advertising Agencies Inc., 1899 L Street, N.W., Washington, DC 20036 • (202) 331-7345
Executive Vice President

October 3, 1989

Mr. Edward H. Baxter
Chief Counsel and Staff Director
Senate Subcommittee on Patents,
Copyrights and Trademarks
327 Senate Hart Office Building
Washington, D.C. 20510

RE: S.1253, To Amend the Copyright Law Regarding
Work Made For Hire

Dear Mr. Baxter,

I am sending comments by the American Association of Advertising Agencies (A.A.A.A.) on S.1253, a bill discussed at the September 20 hearing in the Patents, Copyrights and Trademarks Subcommittee. Enclosed with this letter, you should find three copies.

The A.A.A.A. is a national trade association of the advertising industry. Our membership is composed of 763 advertising agencies across the United States. These agencies create, produce and place more than 75% of all national advertising.

As you may well realize, working with freelance artists and photographers is an integral part of our business. As important as freelance contributions are to advertising, we must express reservation to any legislation that threatens the ability for agencies and their freelancers to enter into working relationships. We feel that enactment of S.1253 would have such an impact.

We hope you will consider our perspective. Respectfully, we submit these comments for publication in the official record of the September 20, 1989 hearing on the Work-For-Hire provision of the Copyright Act.

If you should have any questions, please call me. Thank you for your assistance.

Yours truly,

Harold A. Shoup

BEFORE THE SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS
OF THE
SENATE JUDICIARY COMMITTEE

Comments of the
American Association of Advertising Agencies
on S.1253,
To Amend the Copyright Law
Regarding Work Made for Hire

The American Association of Advertising Agencies (A.A.A.A.) appreciates this opportunity to comment on S.1253, legislation proposed by Senator Thad Cochran (R-MS), concerning the work-for-hire provision of the Copyright Act of 1976.

The A.A.A.A. is a national trade association of the advertising industry. Its members include over 760 advertising agencies, from the smaller to the largest. Collectively, these agencies account for approximately 80 percent of all nationally placed advertising, as well as a substantial amount of regional and local advertising.

The A.A.A.A., pursuant to the hearing held by the Subcommittee on S.1253, September 20, 1989, believes that this legislation is unnecessary. This is why:

Freedom of contract exists under current law. Advertising agencies, acting on behalf of their clients, negotiate contracts with freelance contributors. Both sides negotiate terms for usage and compensation that best suit each

party's interest. Both sides have the opportunity within the course of contractual negotiations to express their needs in the relationship.

The parties involved agree upon terms and execute the contract. This may result in designating the freelancer's contribution as a work made for hire, in which case the freelancer agrees that the copyright will rest with the commissioning party. Or, the contract may assign certain usage rights over the work, without otherwise affecting the copyright. At any point, both sides have the freedom to walk away from contract negotiations if they cannot reach some agreement. This process represents the application of current law with respect to the hiring of freelance services.

S.1253 would not change this working relationship to the advantage or detriment of either the commissioning party or the freelance contributor. The bill will not address what its proponents see as "abuses" within the industry. Those "abuses" of perceived unequal bargaining position, <u>if</u> they exist, arise from the nature of the marketplace, <u>not</u> from copyright law. The law provides the opportunity for two parties to enter into a contractual agreement of their own making. If, however, a freelancer and an advertising agency work without executing a contract before the work is begun, then the Supreme Court

decision in June of this year, Community for Creative Non-Violence v. Reid, 109 S.Ct. 2166 (1989), establishes guidelines for determining copyright ownership in these circumstances.[1]

Legislation, such as S.1253, is inappropriate and unwarranted to "correct" the Copyright Act at this time. During the Subcommittee hearing on September 20, testimony was presented by freelance creatives alleging "unfairness" and "misuses" of the work-for-hire provision. As best we can determine, however, their arguments are based upon the uncertain copyright atmosphere that existed prior to the CCNV v. Reid decision.

Furthermore, the arguments set forth in the written testimony of the Copyright Justice Coalition in support of S.1253 constitute nothing more than naked heresay. The "complaints" leveled against the advertising industry are confused and lack factual substance. While a commissioning party has the right to ask a freelancer to agree to a work-for-hire provision in a contract, the freelancer has a

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1 Subject to an ancillary determination on remand, the CCNV v. Reid ruling upheld an artist's copyright over a sculpture he created under commission. The decision greatly clarified the legal landscape for freelancers and those who commission their works and services.

corresponding right to object to such a provision. Again, current law fosters -- not inhibits -- freedom of contract.

In conclusion, the Supreme Court has spoken in CCNV v. Reid; S.1253 will not enhance that decision and, therefore, enactment would represent unnecessary law-making. The American copyright system serves to promote a flexible and fair framework for marketplace forces coincident with the goals of widespread production and dissemination of creative works. The advertising industry, including advertisers, agencies and freelancers, needs that flexibility. Any tampering with this system may result in fewer opportunities for those who chose to work independently, and in fewer opportunities for those who commission freelancers to obtain fresh and varied creativity.

October 3, 1989

Harold A. Shoup
Executive Vice President

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October 12, 1989

The Honorable Dennis Deconcini
Chairman
Subcommittee on Patents, Copyrights,
and Trademarks
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

At the hearing conducted by your subcommittee on September 20 on publishing moral rights and works made for hire, certain assertions were made to you in testimony by the Copyright Justice Coalition (CJC) concerning the use of work made for hire by TIME Magazine. We would like to take this opportunity to respond to those assertions and discuss the use of work made for hire by The Time Inc. Magazine Company generally.

In brief, the transaction involving Ms. Elle Schuster's photograph prepared for TIME Magazine's cover constituted nothing more than a misunderstanding and was not an "abuse." It simply cannot reasonably be regarded as in any way helping to bear the heavy burden of those proposing to change the work made for hire provision of the Copyright Act.

The Time Inc. Magazine Company is a wholly-owned subsidiary of Time Warner Inc. The magazines we publish, including TIME, SPORTS ILLUSTRATED, PEOPLE, LIFE, FORTUNE and MONEY, make extremely limited use of works for hire for photographs and other artistic contributions. In fact, these magazines only use work made for hire for their covers.

TIME Magazine considers its covers historically and artistically significant. For that reason, it attempts to exercise as total control over the art as possible. This includes acquiring ownership of the physical artwork, not just reproduction rights, which is unusual among magazines.

There are a number of reasons for TIME's assertion of ownership. TIME has mounted numerous displays of its cover art, which serve artistic, historic and cultural (as well as promotional) purposes. Since 1968, TIME has donated its cover art to the Smithsonian Institution, and the National Portrait Gallery in Washington currently houses the TIME collection in a permanent exhibition space. The Smithsonian has published at least one book of TIME covers. TIME also takes pride in

showcasing world-famous artists on its covers; it has published covers by such prominent figures as Robert Rauschenberg, Andy Warhol, Jim Dine, Christo, and Jamie Wyeth. TIME also reprints many covers, dating back to its inception in 1923, for a variety of purposes. Thus, TIME affirmatively makes use of its covers -- both as printed and as original artwork -- in many ways, and for this reason needs to be fully protected in the rights it obtains.

Conversely, TIME believes that once an image is selected as a TIME cover it should not be used in other contexts. If an artist retained, or obtained through reversion, rights to the work, he could sell the work to another publication, which would dilute the work's identity as a TIME cover. Or, he could sell the work for commercial use, which would diminish not only that image but also the universe of TIME covers. Thus, TIME does not permit a photographer who shoots a TIME cover to sell any "similar" pictures from his take.

TIME considers its covers a catalogue of history, in effect. Every year, for example, it republishes all of its "Man of the Year" covers, beginning with Charles Lindbergh in 1923. Because TIME makes this and so many other historic uses of its covers, it seeks to have the unambiguous right to all its covers for as long as it is functioning.

Notwithstanding the need to retain rights, TIME liberally grants the artist the right to use or reproduce cover work in any exhibit, catalogue or portfolio of his or her own material, as indicated in the contract signed by Ms. Schuster. Further, although TIME's cover rate is $3,000, which includes the rights described above, on occasion a higher price will be negotiated, depending on the stature of and demand for the artist.

TIME's subsequent use of its covers is almost always related to the subject pictured, not the artist who created it. This is unlike the situation of concern to the drafters of the Copyright Act when a magazine buys a work from a young, unknown creator who has no fame or bargaining power and continues to exploit it after he becomes famous. Moreover, the artwork will have increased in value precisely because it was used as a TIME cover. In other words, instead of TIME's being in the position of exploiting the artist's increased worth, the artist would be piggybacking on the fame and promotion of TIME.

At the September 20 hearing, the CJC asserted in its testimony that TIME's acquisition of work made for hire rights on cover art from Ms. Elle Schuster for its October 19, 1987 issue constituted an "abuse." According to the CJC testimony, Ms.

Schuster claims that she was not apprised that her contribution would be a work made for hire until after she had completed it, that TIME would not publish her photograph on the cover unless she signed a work made for hire contract, and that failing to sign would mean she would not be reimbursed for expenses she had incurred on the project. Further, according to that testimony, signing the contract meant she would forego future income from additional sales of her work.

TIME believes that a misunderstanding or miscommunication may have occurred with Ms. Schuster and, if so, it constituted a rare mistake in our negotiations for acquisition of cover art. But TIME rejects characterization of this situation as an "abuse" of work made for hire provisions of the Copyright Act.

Ms. Schuster, a first-time contributor to TIME, no doubt was not familiar with our consistent policy that covers are work made for hire. While memories may differ, we will not dispute that through misunderstanding in some fashion, Ms. Schuster was not made aware that we required work made for hire for our covers before she did the work. It is not possible, however, that she was commissioned on a single use basis; cover work is simply not commissioned on that basis.

We also certainly do not disagree with the CJC that Ms. Schuster's work would not have been published on the cover absent a work made for hire agreement. This is so for all the reasons discussed above. But it is untrue that Ms. Schuster would not have been paid, both fee and expenses, for her work even if it were not used on the cover. A variety of factors, among them late breaking important news stories or changing views on what the cover art should be, cause work commissioned for TIME covers not to be used several times each year. Customarily, the artist is paid the agreed upon fee plus whatever expenses have been incurred. That custom would have been applied to Ms. Schuster under these circumstances. Thus, Ms. Schuster was not forced to sign the work made for hire contract in order to be paid for her work.

Finally, with respect to the fee itself, as noted above, TIME's standard rate is $3,000 per cover. This was the fee agreed to with Ms. Schuster. While Ms. Schuster may or may not have been able to generate additional income by reselling the photograph she contributed to TIME we believe, frankly, that her reputation and career overall enjoyed a boost, with a consequent impact on earnings from all of her work, from her appearance on the TIME cover. In any event, Ms. Schuster could have elected not to sign the work made for hire agreement, and although

sacrificing her photograph's appearance on the cover could have profitted from reselling it. The fact that she chose nonetheless to agree to its appearance on the TIME cover as work made for hire indicated she valued that appearance more than whatever income might have been derived from a multiple resale of that photograph. (Recall that, as indicated above, TIME would have paid her fee and expenses regardless of whether or not her photograph was published.)

In sum, TIME certainly regrets any misunderstanding by Ms. Schuster of its policy on covers at the outset, but in no way was she compelled or coerced to sign a work made for hire agreement. She voluntarily relinquished her potential for further income in that photograph in the apparent expectation of other benefits, including financial, from an initial contribution to a TIME cover.

A simple misunderstanding that did not damage either party, should not be the basis for substantially revising the work made for hire provision of the Copyright Act. That provision was a delicate, balanced compromise produced from protracted negotiations, that continues to serve essential and functional business and public policy purposes. It is indispensable to many collaborative works (such as TIME covers) and benefits both publishers and authors. Therefore, we urge you to consider very carefully before moving beyond the clarifications prescribed by the Supreme Court in the case of CCNV v. Reid; until we have all had enough time to adjust to and gauge the impact of that decision, further change would be premature and unwise. On this, we share the views of the Magazine Publishers of America, the Association of American Publishers, and the Committee for America's Copyright Community.

Thank you.

Sincerely,

Robert L. Miller

/rr

cc: Members of the Patents, Copyrights,
and Trademarks Subcommittee

Department for Professional Employees, AFL-CIO
815 16th Street, N.W., Washington, D.C. 20006 Phone 202/638-0320

October 13, 1989

Senator Dennis DeConcini
Chairman, Subcommittee on Patents, Copyrights and Trademarks
Committee on the Judiciary
SH-327 Hart Senate Office Building
Washington, D.C. 20510

Comments on S. 1253-Work for Hire Bill

Dear Mr. Chairman:

These comments on S. 1253, Senator Cochran's work made for hire bill, are filed on behalf of the Department for Professional Employees, (DPE) AFL-CIO. The DPE is comprised of 29 national and international unions which represent approximately three million professional and highly skilled technical workers, a significant portion of whom are engaged in the production of works which are copyrighted.

We believe that the changes in the work made for hire provisions of the 1976 Copyright Act proposed by S. 1253 are consistent with the original intent of Congress in enacting the current definition of work made for hire. We further believe that those changes will lead to greater predictability and fairness in the application of the work made for hire definition in the marketplace in which it is often the critical determinant of the identity of the copyright owner.

In our view, it is fundamentally unfair and contrary to congressional intent to deem a person an "employee" for purposes of the work made for hire definition unless a formal, salaried relationship exists. If that relationship exists, the true employee has a meaningful opportunity, afforded by the right to collectively bargain, to negotiate for fair compensation in exchange for the forfeiture of his copyright rights. Without the right to collectively bargain, however, the putative "employee" is divested of his rights (automatically and forever), and lacks the economic power to secure adequate compensation for the loss of

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his copyright. Accordingly, by conditioning the forfeiture of copyright rights on the existence of a formal, salaried relationship that permits compensation to be set on the basis of collective bargaining, the bill addresses the disparity of bargaining position that has traditionally worked to the disadvantage of creators.

The formal, salaried definition of employee is also desirable because it avoids the uncertainty and unpredictability associated with the common law agency approach adopted by the Supreme Court in the Reid case. Application of a multi-factor test to the infinite variety of working relationships will necessarily be fact-intensive and will lead to further litigation. The bill would give both creators and those who hire them the ability to know in advance who the owner of the copyright will be under the work made for hire definition.

Another aspect of the bill that deserves specific mention is its proposed clarification of the definition of "joint work". We share the concern of other members of the Copyright Justice Coalition that the vagueness of the current definition is an invitation to commissioning parties to assert joint authorship status indiscriminately. The current law is also certain to cause a great deal of litigation as publishers and other commissioning parties assert a joint work defense to infringement actions, and as the claimants to a piece of the copyright pie proliferate wildly under the current "intent" test used to determine joint authorship.

The requirement of a prior, written agreement in order for a commissioned work to qualify as a joint work is reasonable given the nature of the commissioner-creator relationship, and is consistent with other writing requirements already included in the copyright law (e.g., the writing requirement before a commissioned work can be a work made for hire under the second subdivision of the definition of that term; the writing requirement before an assignment of copyright is valid under section 204 (a)). We do not believe that the courts will be subject to any greater burden if this requirement is not met than they face under the current vague definition of joint work that turns exclusively (and necessarily subjectively) on the intent of the parties.

We urge your favorable consideration of S. 1253 and its prompt enactment by this Congress.

Sincerely,

Jack Golodner
Director

JG/jb

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October 16, 1989

HAND DELIVERY

Ed Baxter, Esquire
Chief Counsel
Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
SH 327 Hart Senate Office Building
Washington, DC 20510

Re: Works For Hire Hearing

Dear Ed:

Enclosed is the original statement and Exhibits by Houghton Mifflin Company, for inclusion in the hearing record of September 20, 1989 on works made for hire.

A fax with some of the enclosures was delivered last Friday. Included in the final submission are excerpts from Houghton Mifflin's Art Preparation Guidelines (note the stereotyping guidelines on the final page) and specifications for actual illustrations for two stories for an English and a reading textbook. These demonstrate the exacting specifications of the publisher in commissioning an illustration and that they are not likely to be created but for the assignment of the publisher.

I will give you a follow-up call, after the moral rights hearing.

With best regards,

Larry S. Snowhite

LSS/djw
Enclosure
1634h

cc: Charles A. Butts

Houghton Mifflin Company

One Beacon Street, Boston, Massachusetts 02108
(617) 725-5000 Cable HOUGHTON

October 13, 1989

The Honorable Dennis DeConcini
Chairman
Senate Subcomittee on Patents, Copyright
and Trademarks
327 Hart Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

I am writing to you on behalf on Houghton Mifflin Company regarding the September 20, 1989, hearing on moral rights and works made for hire, and request that this letter be made a part of the record.

Houghton Mifflin Company is a publicly held, diversified publisher of adult and children's fiction and non-fiction, of dictionaries and other reference materials, and of textbooks and other instructional materials, including electronic products, for elementary and secondary schools at all levels and for college and university students. In 1988, our corporate net sales were $368,300,000 of which over 80% ($297,300,000) came from textbooks and other educational materials and services.

Your hearing focused on the procedures under which copyright in a work is owned by a publisher as a work for hire, defined in Section 101 of the Copyright Act as either (1) an employer or (2) a person specially ordering or commissioning an instructional text, or any of the eight other specified categories of works, provided that there is a written agreement between the commissioning and commissioned parties that it is a work made for hire. I will direct my comments specifically to these issues.

Senator Cochran has introduced S. 1253, which would amend current law to define an "employee" and address other issues involving the procedures for establishing a work for hire. Houghton Mifflin Company compliments Senator Cochran because of what his bill does not propose — it does not propose to delete instructional texts and several other categories for which contributions may be treated as works made for hire. We commend this recognition of the validity and the importance of the proper use of work for hire agreements for instructional texts and other works listed in Section 101 (2) of the Copyright Act.

We agree with the principle of responsible use of works for hire as advocated by Senator Cochran, but we are concerned with the specific interpretations and resulting implementation of provisions of S. 1253. To facilitate the Committee's evaluation of the impact of such proposals, we believe it would be helpful to review for the record the rationale for publishers to acquire the copyright under the work for hire doctrine as it applies to instructional texts.

Our focus in this letter is on work for hire agreements with independent contractors under clause (2) of Section 101. We are not as concerned here with work "prepared by an employee within the scope of his or her employment" under clause (1). The recent Supreme Court decision in CCNV v. Reid has established a test for determining who is an "employee." More importantly, it has established conclusively that an employee under clause (1) and an independent contractor/freelancer under clause (2) are mutually exclusive categories for purposes of works for hire. We endorse that distinction as our practice shows. Taken together, CCNV narrows the scope of works that may be considered works for hire and may resolve many of the implementation problems that have plagued freelancers and concerned the Committee. What is an "employee" is a briar patch that has ensnared numerous Congressional committees. It is not susceptible to a clear and unequivocal bright-line test, whether it be the CCNV agency test or the proposed test in S. 1253. While Houghton Mifflin can continue to operate under either, and agrees that the definition should be narrowly construed, it seems prudent to allow the full impact of CCNV to be sorted out in the marketplace.

More than 100 years of experience developing instructional materials have given us a strong sense of our role as a responsible educational publisher. It is our goal to make substantive and unique contributions to the quality of education by shaping, developing, and distributing educational materials that enhance teacher effectiveness and student mastery. Obviously, any legislation that affects our business, our employees, and our ability to publish quality materials — effective and responsible instructional materials for the nation's classroom -- is of vital interest to us and to all Americans who are concerned about the quality of education in our country.

Houghton Mifflin publishes educational materials for all the major elementary, secondary, and college subject areas. These publications include student textbooks and workbooks; teachers' manuals; enrichment and remedial resources and instructional management systems; standardized tests and scoring services; and professional development materials for teachers and prospective teachers. In order to address a variety of educational needs, and remain in a highly competitive market, these publications take many forms, ranging from printed books to software for computer-assisted and computer-managed instruction, interactive databases of information, and training modules on videocassettes.

We do not just publish books, we publish authors. Without authors -- writers, artists, photographers — we would be hard pressed to continue to produce the quality instructional materials that we and the nation expect and demand. We believe it to be in our self-interest and the interest of our educator-customers to be an author-sensitive publisher, able to attract and retain freelance authors, which in turn enhances the quality of our product and strengthens us in the eyes of our customers, suppliers (including independent, freelance contributors to our works), employees,

and shareholders. We take seriously our responsibilities as a publisher of instructional materials, and the attached document (Exhibit A), The Publisher's Role in the Education Process, provides a chronological overview of the process, our commitment, and the absolute necessity for management of our substantial, ongoing investment in published materials.

Within the book publishing industry there are great differences between the steps toward successful publication of a work of fiction and a program of instructional materials, such as a program of language arts for the elementary school, for example. Houghton Mifflin's starting point for a work of general fiction, non-fiction, or poetry — a Trade book — probably will be a manuscript or manuscript outline which has been submitted by an author or agent, with publication based on the literary merits and the marketability of the author's work. This may also be true for some textbooks, such as are commonly written for use in colleges and universities, quite often based on a professor's lecture notes. A work for hire agreement is not going to be used for such Trade or college level works.

In sharp contrast, when publishing most instructional materials, the work would not have been created without the publisher's special commission. Following the publisher's market research and planning for a program to be published for use in systematic instructional activities, the development of the pedagogical approach and format, and the setting of the budget, the publisher initiates the creation of the works by specially commissioning or assigning a party or parties to contribute specialized knowledge or skills. In the case of employees of the publisher, this may be by task assignments, and in the case of independent contractors, through the use of formal work for hire contractual arrangements as required by the copyright law.

These are "managed publications" designed to help teachers achieve their curricula goals in an orderly fashion. The successful publisher's creative effort is reflected in how well the materials satisfy the market. It is for that reason we have followed very closely and participated actively in the debates over previous efforts to introduce legislation that would affect the eligibility of instructional materials for work for hire agreements. As stated in our submission during the 1982 hearings, we sincerely believe that "we would not be able to make the long-range investments in major programs and we would not be acting responsibly on behalf of authors who depend on royalties from the sales of works over a period of years" if we were not able to exercise control over the way all contributions fit into our instructional programs. Work for hire agreements are a uniquely effective means to assure that requisite control.

In order to accomplish the objective of publishing an effective instructional text, Houghton Mifflin must set detailed standards to be followed by its employees and by those independent freelancers it

commissions to prepare materials. Obviously these standards are intended to make it possible for the materials to be prepared in accordance with the specifications our experience and knowledge deem appropriate to make them capable of being integrated into a complete program of instructional materials. This produces a managed publication and, in accepting the commission/assignment, the party preparing the work acknowledges the necessary limitations on creativity and autonomy. We again want to stress that there is no "work" created by the author prior to our commissioning.

I think it is appropriate to comment here on the testimony of Richard Weisgrau, Executive Director, American Society of Magazine Photographers, presented at the September 20 hearing. On page 31 of his prepared statement, he accurately quoted the statement of our standard work for hire agreement used for contributions of text material, illustrations, or photographs to one of the eligible nine categories (a copy of our standard contract is attached as Exhibit B). Our contract makes it clear up front that the work produced as a result of the assignment is to be a work made for hire. He might have also quoted from the final sentence of that agreement, which reads as follows: "Since it is necessary to have fully signed copies of this agreement prior to your beginning your work, please sign and return one copy of this letter in the enclosed envelope before proceeding with this assignment." (emphasis supplied)

Illustrations in particular are prepared to exacting specifications. They are commissioned to functionally "illustrate" the text in which they appear, usually to help teach a specific skill and they seldom have instrinsic value as free-standing works of art. The current Houghton Mifflin Language Arts Program involved contracts with 125 freelance artists for the illustration program to supplement the text. The instructions to these artists were specific as to format, content, and delivery dates, and all agreements were for works made for hire. Attached as Exhibit C is a copy of a purchase order for a photographer and one for an illustrator to show the extensive specificity of the assignments. They offer tangible evidence that the works would not be created unless they had been assigned by us.

The need for a publisher to manage the contributions to the textbook does not end upon submission or publication. It takes many years to develop and produce a textbook, which if successful will be on the market for many years in subsequent editions, revisions, adaptations, or related uses as may be necessary to meet market needs and new technologies. We can't forecast the formats those markets will require, nor can we tell whether or not the first edition of a program will be successful enough to justify revision 3-5 years hence. We must therefore be in a position to revise, reformat, or adapt our textbook to respond to changing market needs and competitive requirements.

The hoped-for result is a finished work, with the publisher interweaving the efforts of employees and independent contractors into a seamless web

that meets the publisher's designated purpose and use. Work for hire agreements enable the publisher to assemble a textbook possessing comparable rights for comparable contributions of employees and independent contractors. Possessing comparable rights provides the publisher with the certainty and predictability that is needed to manage the hundreds of contributions that together traditionally create a textbook.

We believe that the major criticism of the implementation of work for hire agreements, which claims that authors are deprived of future exploitation of their works because the publisher has acquired all rights to the contribution, is not necessarily an indictment of part 2 of the work for hire provision in Section 101. In our case, those authors who have work for hire agreements with royalties, and there are many, will clearly benefit from the continuing sale of a successful program of instruction and from its revisions. Those freelance contributors of materials which satisfy our requirements for quality will also benefit in that they will be among the first to be commissioned under new agreements for contributions to other projects.

In conclusion, Houghton Mifflin believes that work for hire agreements, particularly as they apply to instructional texts and other instructional materials, have proved to be valuable and effective mechanisms in our ongoing relationships with the many contributors to the complex task of publishing textbooks. The practice of entering into work for hire agreements is common for instructional texts because of sound business principles, and experience tells us that we have made responsible use of work for hire agreements. However, we continue to be concerned with any proposed legislation that would increase and complicate the administrative burdens of publishing instructional materials, and thereby adversely affect our efforts to publish effective and responsible instructional materials for the nation's classrooms. It is for this reason we feel obligated to provide you with these comments in anticipation of further debate.

We will be pleased to expand on any of these points or to discuss any aspects of our further thoughts about S. 1253. Thank you.

Sincerely,

Charles A. Butts, Director
External Relations

CAB:fs

Attachments

cc Senate Judiciary Subcommittee on Patents,
Copyright and Trademarks
Senator Thad Cochran
Ambassador Nicholas A. Veliotes, President
Association of American Publishers

EXHIBIT A

THE PUBLISHER'S ROLE IN THE EDUCATION PROCESS

More than 100 years of experience developing instructional materials have given Houghton Mifflin Company a strong sense of the role of a responsible educational publisher. It is our goal to make substantive and unique contributions to the quality of education by shaping, developing, and distributing educational materials that enhance teacher effectiveness and student mastery. We consider ongoing service and support to the classroom teacher to be an integral part of our commitment to the teaching/learning process.

Houghton Mifflin publishes educational materials for all the major elementary, secondary, and college subject areas. These publications include student textbooks and workbooks; teachers' manuals; enrichment and remedial resources and instructional management systems; standardized tests and scoring services; and professional development materials for teachers and prospective teachers. In order to address a variety of educational needs, these publications take many forms, ranging from printed books to software for computer-assisted and computer-managed instruction, interactive databases of information, and training modules on videocassettes.

The Publishing Process at Houghton Mifflin

Instructional effectiveness is the measure of the quality of our educational materials. Through every stage of the publishing process, from planning to teacher support, we are committed to ensuring quality in these publications.

Learning is always the focus of educational publishing at Houghton Mifflin. Educators' experience, pedagogical research, and careful monitoring of student performance help the publisher to define and shape the instructional materials needed in the classroom. Because instructional materials are the tools of the teaching professional, every stage of the publishing process entails close interaction with educators.

Information Collection

Effective educational publications begin with the collection of vast quantities of information from educational research studies, task forces, conferences, decades of classroom experience with earlier publications, standardized tests, educators, and our own consultants. This information forms the basis for the development of an educational program.

Planning

Very few educational publications at Houghton Mifflin begin with an unsolicited manuscript. Initial planning determines the publication's content and instructional approach. This includes the scope of subject matter to be covered, the sequence of concept development, and the sequence of skill introduction, each of which must reflect the pedagogical plan.

The organization and physical format of the material are also decided at this point.

Selection of appropriate authors, editors, advisers, and reviewers to develop the publication is a crucial part of the planning process. Most publications are developed by a team specially selected to develop them. The members of this team are generally subject-matter specialists, who are former or current teachers drawn from schools and universities. Each member plays a critical part in the development of an effective educational publication.

Writing/Editing

Under the guidance of Houghton Mifflin editors, the authors provide content and implement the instructional approach. The editors' major responsibility in this collaborative procedure is to ensure that the manuscript or software program provides effective instructional support to a broad range of teachers and students. Experts in the field serve as advisers. They verify the content and help guide development. Reviewers evaluate the finished products to ensure that the materials meet their content and instructional objectives.

Classroom Testing

When the manuscript has been completed, it is field-tested by teachers to ensure instructional effectiveness under classroom conditions. This step permits discovery and resolution of potential problems before the material is published. Testing in classrooms continues after publication and this information is incorporated into the planning and content of future publications.

Design/Art

Development of the graphic design and illustrations for the publication is the final step. These elements reinforce the organization of the material and are essential to the publication's motivational effectiveness. The design must support the pedagogy and appeal to students if the program is to facilitate learning.

Educational Publications and Support Services

The publishing process results in textbooks, printed and electronic support materials, and extensive support services designed to help the teacher teach effectively. The success of this teaching/learning process is the focus of every component of the instructional program -- from the textbook to additional resource material, classroom management systems, and professional development materials for teachers. More than 80 full-time Houghton Mifflin consultants provide ongoing individual assistance to elementary and secondary school teachers using our textbooks and materials in the classroom.

Ongoing Commitment to Investment

The publishing process is an ongoing cycle that normally spans more than five years from the information gathering stage to sale and service in the classroom. By the time students begin using the textbook, the information collection and planning phase is already well along for the next edition of the program.

Every textbook program requires investment by the publisher throughout each stage of the development cycle. Much of the net cash flow from operations must be reinfused to sustain momentum in the business. On average, educational publishers annually reinvest from $.40 to $.50 of every dollar of net cash realized into new and revised editions of textbook programs.

As one example, it is now estimated that the cost to develop an entirely new elementary school reading textbook program is about $20 million and as many as seven years of work. Within three years after that program is introduced to the market, a minor revision is necessary to keep it current with research and curriculum. This requires an additional investment of as much as $3 to $5 million. And within three more years, or six years after the original program was introduced, a major revision costing an additional $8 to $10 million is necessary to ensure the program is current and competitive.

This cycle of investment is typical for all textbook programs and, in fact, is becoming increasingly shorter with revisions occurring every two years rather than every three. The commitment to ongoing investment in textbook programs is essential to ensure that U. S. educators and the children they teach have current educational materials available. A commitment to excellence must also be backed by a commitment of financial resources.

EXHIBIT B

Houghton Mifflin Company

One Beacon Street, Boston, Massachusetts 02108
(617) 725-5000 Cable HOUGHTON

date

Dear

This letter of agreement commissions you to prepare and deliver to Houghton Mifflin Company
for (the "Publication").

The work to be prepared by you shall be a work made for hire as defined by the copyright law of the United States. You hereby assign to Houghton Mifflin Company any and all right, title and interest that you may have, including any copyright, in your commissioned work. Your submitted original material will become the property of Houghton Mifflin Company.

This agreement is made with the understanding that the work you prepare for us will not infringe on any copyright or personal or proprietary rights of others.

We will pay you a fee of $_____ upon satisfactory completion of your work.

All concepts, work, materials and related information either developed by you, or disclosed to you by any person acting on behalf of Houghton Mifflin Company, are proprietary and confidential information of Houghton Mifflin Company. We ask that you acknowledge this and agree not to disclose any such concepts, work, material or related information to any other parties, or to make any personal use of them without the prior written consent of Houghton Mifflin Company.

Since it is necessary to have fully signed copies of this agreement prior to beginning your work, please sign and return one copy of this letter in the enclosed envelope before proceeding with this assignment.

Sincerely,

_____ _____

Accepted for Houghton Mifflin Company

EXHIBIT C
Purchase Order No._____
Date _____

TO:

PROJECT:

ASSIGNMENT PHOTOGRAPHY CONTRACT

Houghton Mifflin has the right to reproduce all photos purchased on this assignment in the named text and any or all satellite materials which may accompany the text, published under any imprint including translation, without further payment. Our rights of reproduction are to include advertising and promotional rights and it is agreed that all rights incident to and necessary for Houghton Mifflin's use of the assignment photography are included and conveyed hereunder. This agreement is made with the understanding that the material you will deliver will not infringe on any copyright or personal or proprietary right of others. This contract and attached Purchase Order upon acceptance are to constitute a work for hire agreement for commissioned work.

The photographer agrees that no photograph shot on this assignment for Houghton Mifflin including overshoots, shall be used for any other purpose other than that specified by Houghton Mifflin without written permission. Houghton Mifflin shall retain all overshoots until two years after the book copyright date, at which time the photographer may apply for their return. Written permission to sell and/or reproduce any of these photos must first be obtained from Houghton Mifflin.

If the above project is totally revised in subsequent years, a residual payment of 50% of the unit cost of this assignment will be paid. In addition, if one of these photos purchased on assignment is used in an entirely different program, a payment of 50% of unit cost will be made.

A completed spec sheet and a copy of the manuscript page, if pertinent, are enclosed. The photographer will consult the Art Editor, should s/he consider any changes in the concept of the illustration.

Payment for work hereunder shall be made by Houghton Mifflin upon the satisfactory completion of the assignment. Upon submission of the actual charges for services and disbursements, payment will be made within 30 days. Please sign the attached copy and return. It is understood that prior to the shooting the photographer has agreed to the Purchase Order and contract.

I, _____, have read the contract and agree to the conditions

set forth.

KEEP ONE COPY FOR YOUR FILES

ED-367

Houghton Mifflin Company

School Art Department

One Beacon Street Boston, Massachusetts 02108

SAR № 8523 F

SHOW THIS NUMBER ON ALL CORRESPONDENCE

TO	ESTIMATE	DATE
[redacted] Cambridge, Massachusetts 02138	$[redacted]	10/11/89
PROJECT: Houghton Mifflin Reading 1991 Grade 5 "Operation Wildlife" Unit	CODE NUMBER 1-31911	DATE WANTED

DESCRIPTION

(Estimated page count is 56 pages.)

This P.O. and attached work-for-hire is for the design of the attached focus unit entitled "Operation Wildlife" for Grade 5 for the 1991 Houghton Mifflin Reading Program.

This P.O. is based on an estimate of $[redacted] per page for the following activities:

1. Preparing and designing initial layouts for focus unit (including marking up hard copy for typesetting).
2. Preparing art specifications; selecting and art directing illustrators and photographers; reviewing art work.
3. Photo research as required.
4. Preparing final layout revisions as necessary with all page elements represented.

In addition we will reimburse you for expenses, which should be itemized and documentation provided. We may ask you to provide mechanicals in which case we will negotiate a fee at that time.

All information about procedures and guidelines on fees for illustration/photographers for the program can be found in your Designers Notebook.

SCHEDULE: Please submit rough thumbnails/layout to Judith Slatter, Houghton Mifflin Company, School Art Dept. One Beacon Street, Boston, MA 02108, by October 23. Please wait for feedback before commissioning illustrations and preparing final layout which will be due November 27.

Please include the above code number on all your invoices to Houghton Mifflin along with the number of this Purchase Order. When invoicing, please provide a breakdown of your expenses for example stats, purchase of materials, phone etc they are charged to different accounts at Houghton Mifflin.

The design, art program of "Operation Wildlife" focus unit is to be completed as a work-for-hire contracted for by Houghton Mifflin Company. Please read the attached work-for-hire statement and return a signed copy of it plus a signed copy of this purchase order, to me for our records. You should also obtain signed work-for-hire agreements from illustrators and photographers from whom you commission work. Samples are filled out in your Designers Notebook, and we will supply blanks to you.

The Houghton Mifflin art co-ordinator on this project is Judith Slatter, phone number 617-725-5653

ALL WORK SUBJECT TO PUBLISHER'S APPROVAL

*DIRECT INVOICE USING THIS P.O. NUMBER TO: OK RH.

SIGNATURE _____ TELEPHONE NUMBER _____

SIGNATURE OF ARTIST _____ DATE _____

SAMPLE GUIDELINES

ART PREPARATION GUIDELINES (for illustrators)

This checklist is designed to assist you in preparation of sketches and finishes. By using it you will ensure the best possible reproduction of your artwork. You should refer to it for technical information on sizes, use of color, positioning, and presentation of both sketches and finishes. It is expected that you read and become familiar with the contents before you begin to work on this project. If you have any questions, don't hesitate to call the Art Editor.

- **FOUR COLOR**

To get the best possible reproduction of your works, it is very important that the work be prepared correctly. To achieve clean, bright colors, your color in the original should be clean and bright. Contrast and sufficient detail are important in the shadow areas in order to hold up on reproduction. Light washes can look very thin or even disappear if they are too light. You won't be disappointed in the results if you think carefully about preparation, since the color separator's task is to adhere faithfully to the artwork you create. Following are some helpful guidelines to that end.

- **MEDIUM**

The four process colors are black, yellow, blue and magenta, and the colors we are able to reproduce are combinations of these.

We have found that the media that reproduce the best are watercolors, crayons, and colored pencils.

Be careful in creating texture with a colored pencil. The texture will be heightened on press and may tend to muddy your illustration. In addition, when a black crayon is used, for example, to model a black face, the effect will tend to be an unpleasant mottling.

Be aware that many of the fluorescent inks cannot be accurately reproduced and may look muddy. Iridescent colors in particular do not reproduce successfully such as bright orange, lime green, hot pink, and the aqua/turquoise blues.

Avoid mixing Chinese white with your palette or using it to retouch. The camera will pick it up.

Avoid using press-down Pantone as the camera will pick up fingerprints, wrinkles and air bubbles in this material.

- **SIZE**

It is highly recommended that all finishes be prepared at same size. Make sure dimensions are correct as indicated on the dummy. If you wish to work up-size, you must clear it with your Art Editor first. Be aware that the only recommended enlargement is 1–1/2 times the original size. If you are given permission to work at 1–1/2 times up, all finishes must be prepared consistently for the same reduction.

- **POSITION**

For the most part, all art should be kept at least 1/4" away from type, although a small area may extend as close as 3/16" if the entire piece isn't that close. If you are not planning to bleed the illustration, keep it at least 1/4" away from the trim edge.

- **OVERPRINTING TYPE**

If there is a reason to overprint type on your art, the Art Editor will indicate it to you. The area where type is overprinting must be light and flat in color.

- **FOLIOS**

Position of folios and running feet will be indicated on the make-up-dummy. Illustrations must work around this type. Folios could overprint on a very light wash, but it is most important that they are readable.

- **BLEEDS**

When your illustration bleeds off the page you must allow an extra 1/8" for that bleed; Important detail must clear the trim edge by at least 1/4". You may be asked to butt your illustration to a keylined box. In this case you must allow 1/8" bleed so that the separator can ensure a tight fit to the keyline.

- **ART GOING ACROSS A SPREAD**

When art goes across a double page spread then please be aware that your artwork will be split in the center where the book is stitched. Avoid putting important details within 1/2" of the stitch line. Strong diagonals going across the center should be avoided or carefully planned. Try to avoid placing a figure in the center where the art will split (the gutter area). See attached diagram on how to prepare your artwork in this case.

- **LETTERING**

Any hand lettering or type to be shot for line must be put on a separate overlay, and registered to the base of the artwork.

- **BLACK LINE**

Any additional black line, e.g., lettering, and keyline boxes, should always be separated on an overlay from the 4–color base. In your illustration, if the effect you want to achieve is a crisp outline, we strongly recommend separating the black line from the color on an overlay. If your line is part of your base it art, it will be seen by the camera as a combination of the four process colors and will therefore appear as a soft, rather than a sharp, edge.

- **OVERLAYS**

Overlays must be registered to the base with the standard register marks.

- **BOARD**

Use as smooth a board as possible, and one that is thin and flexible to the point where you can roll it with your hands. Your artwork will probably be put on a scanner, which has a large drum (about 8" in diameter) around which the artwork will be rolled.

The scanner is a very sensitive device and will pick up any texture in the paper or board you are using, hence, the advisability of using a smooth board.

- **SKETCHES**

If you are doing sketches, please position each sketch on the make-up-dummy or layout to show its exact size and placement. In all cases, sketches should give a clear indication of your plans with regard to color, position of elements within the space, relationship to type, and content. Include a description of planned techniques for finish (e.g., "color with black line on separate overlay", or "water color wash," etc.). Pencil sketches are fine, providing that at least one shows the use of color planned for finishes.

- **REVIEW AND COMMENTS**

We will be reviewing your work, both sketches and finishes, from an editorial point of view as well as an artistic one. It is expected that any comments returned with your sketches will be incorporated into the finishes.

▪ SUBMISSION OF FINISHES

1. Indicate the size: s/s or percentage of reduction.
2. Include cropping instructions only if really necessary. Place your crop marks well outside the image area or on a tissue overlay. Be sure to include center crop marks for spreads. Do not indicate trim with pencil lines; even blue pencil will reproduce on 4-color art. Leave no pencil lines within the illustration!
3. Indicate the position of text and folio on a tissue overlay.
4. Return the make-up-dummy and sketches.

▪ CREDIT

Do not sign or mat your finishes; credit for your work will appear in the acknowledgments section of the book.

▪ MAILING

Please sandwich your art between two strong pieces of board and place a cover sheet over it to protect the art surface from abrasion. Finishes should not be matted.

▪ STEREOTYPING GUIDELINES

The depiction of the elderly, people of various ethnic groups, the handicapped and women is of great concern to us in all textbooks. Your Art Editor will be writing art specs to include a diversity of racial and ethnic groups, handicapped persons, the elderly, women and men in positive and non-traditional roles. In formulating art ideas, you should be aware of our concern and try to help in achieving these aims.

Above all, you should avoid placing any of the types of people mentioned above in derogatory or stereotypical situations. For example, showing members of ethnic groups in "traditional" dress, activities, or environments should be avoided unless it is specifically required by the text. Characters should be depicted without exaggeration of racial or ethnic characteristics. Crowd scenes should be fully integrated in sexual, social, ethnic, and chronological age representation. People should be represented realistically by a variety of physical types (short, tall, stocky, wearing glasses, etc.). When depicting handicapped persons, be sure to render such things as wheelchairs, leg braces, and hearing aids. When the elderly are depicted, they should be shown taking an active part in everyday life.

Please do not show any characters smoking, drinking alcohol, or taking drugs. Weapons such as axes, sharp objects, guns, bow and arrows, explosives, and matches should be avoided in illustrations unless there is some historical context that makes their portrayal appropriate. Brand names should not be shown unless specifically requested. The depiction of junk foods should be avoided altogether, including candy, cakes, snacks, soft drinks, hotdogs, and confections, even though they may be mentioned in the text.

Art Specification/Approval Form

Houghton Mifflin School Division

Series Houghton Mifflin English Date [redacted]

Author/Title

Selection, chapter Level 6, Unit 12 Page 390-391, 392-393

Artwork: ☐ 1/color ☒ 4/color ☐ 2/color Photography: ☐ b/w ☐ color

Purpose:

Description: (include style, mood, size, any special treatment or other comments; give source of any reference material)

pp. 390-391

Please illustrate the scene as described in the text. We would like to treat Robinson Crusoe and Alexander Selkirk as two different people, so Crusoe here need not look similar to Selkirk in the second extract. The atmosphere should be realistic and dramatic, as it is conveyed in the test.

You should do the illustration of the border for pp 390-391 and this illustration on one board, so that you can organize the composition of the border to suit the illustration. Please show how the border and illustration will be integraged on your sketch.

p. 392 A small illustration, softly vignetted, showing Crusoe sitting on the cliff maybe silhouetted against the setting sun.

p. 393 Please draw an oval frame, fairly ornate, with a portrait of Selkirk the man. If you can't find reference for him please just leave a blank oval and we will find something to put in it!

Artist or Photographer: [redacted]

APPROVALS (It is assumed that the signing party has shown the material to all appropriate members of the Editorial Department.)

Final spec	Sketch	Finish	Final Approval
☑ Approved	☐ Approved	☐ Approved	☑ Approved
☐ Approved with changes	☑ Approved with changes	☑ Approved with changes	
Date: 9/9/86	Date: 9/25/86	Date: 10/1/86	Date: 10/22
Art Editor/ Editor:	Art Editor/ Editor	Art Editor/ Editor	Art Editor/ Editor

Spec OK	Spec out	Sketch in	Sketch out	Finish in	Revise in	APPROVED

Art Specification/Approval Form

Houghton Mifflin School Division

Series HOUGHTON MIFFLIN READING Date 10/22/84

Author/Title [redacted]

Selection, chapter [redacted] Page 85

Artwork: ☐ 1/color ☒ 4/color ☐ 2/color Photography: ☐ b/w ☐ color

Description: (include style, mood, purpose, size, any special treatment of other comments)

In this illustration, we should see Polly, the German shepherd, helping Michael's mother. One idea would be to show her barking or tugging at her skirt, to let her know someone's at the door. Another might be to show her tugging at her to let her know that a pot's boiling over on the stove while she's not watching. It must be clear from your illustration that the dog is not just a pet--that she's been specially trained to help the deaf. If you choose to do the first suggested scene, please show a young white woman in a wheelchair at the door, who's coming to visit the Turners. If you choose the second, please show Mrs. Turner doing something other than cooking--perhaps working at the kitchen table with a small calculator, or studying with large books on the table, or reading the newspaper. No one else should be shown in the room. Please note that if you choose to do the first suggested scene using the visitor in the wheelchair, you will not have to show the woman in the wheelchair in the final illustration--the plan is for just one person to be shown in a wheelchair in this story.

Artist or Photographer [redacted]

APPROVALS (It is assumed that the signing party has shown the material to all appropriate members of the Editorial Department.)

Final spec	Sketch	Finish	Final Approval
☐ Approved	☐ Approved	☐ Approved	☐ Approved
☐ Approved with changes	☐ Approved with changes	☐ Approved with changes	
Date:	Date:	Date:	Date:
Editor:	Editor:	Editor:	Editor:

Spec OK	Spec out	Sketch in	Sketch out	Finish in	Revise in	APPROVED

Art Specification/Approval Form

Houghton Mifflin School Division

Series HOUGHTON MIFFLIN READING Date 10/22/84

Author/Title [redacted]

Selection, chapter [redacted] Page 87

Artwork: ☐ 1/color ☒ 4/color ☐ 2/color Photography: ☐ b/w ☐ color

Description: (include style, mood, purpose, size, any special treatment of other comments)

In this scene, we should see Michael and 11 year old Gina (remeber that she wears glasses), who's holding the invitation to the play from her teacher. It will be up to you to come up with an interesting way to show the two kids--one idea would be to position them as if they're discussing whether to tell their parents about the invitation, or to have them looking at each other with hopeful expressions, as if they're thinking about the good time they'll have at the play.

Artist or Photographer [redacted]

APPROVALS (It is assumed that the signing party has shown the material to all appropriate members of the Editorial Department.)

Final spec	Sketch	Finish	Final Approval
☐ Approved	☐ Approved	☐ Approved	☐ Approved
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Date:	Date:	Date:	Date:
Editor:	Editor:	Editor:	Editor:

Spec OK	Spec out	Sketch in	Sketch out	Finish in	Revise in	APPROVED

Art Specification/Approval Form

Houghton Mifflin School Division

Series HOUGHTON MIFFLIN READING Date 10/22/84

Author/Title [redacted]

Selection, chapter [redacted] Page 89

Artwork: ☐ 1/color ☒ 4/color ☐ 2/color Photography: ☐ b/w ☐ color

Description: (include style, mood, purpose, size, any special treatment of other comments)

This full page illustration is the final one in the story, and it should be the most exciting and lively. It's set backstage at the theater. As you know from the text, Gina's teacher signs to Mrs. Turner at the end of the play, and this is an exciting moment for Michael and Gina. So, in this scene, we would like to show a number of people chatting after the performance, with many of the people using sign language. The total number of people is your choice, as long as Michael, Gina, the teacher (an Asian woman in her 30's) and Mrs. Turner are shown. You might want to choose an interesting viewpoint, such as from behind Michael and Gina--that way, you would have more room to show the other people. Please show more females than males in this scene (I'm low on my total female count in the book as a whole!), and if you didn't choose the scene with the wheelchair on the previous spec, please include a young white woman in a wheelchair in this scene, who's actively participating in the conversation. For color and variety, you could show some of the actors still in their makeup and costumes from the play, The Wooden Boy. (Pinocchio) I've enclosed some photocopies of pictures taken of the actual play for your reference--these photos will appear at the end of this story, in a companion piece 2 page photo essay.

Artist or Photographer [redacted]

APPROVALS (It is assumed that the signing party has shown the material to all appropriate members of the Editorial Department.)

Final spec	Sketch	Finish	Final Approval
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☐ Approved with changes	☐ Approved with changes	☐ Approved with changes	
Date:	Date:	Date:	Date:
Editor:	Editor:	Editor:	Editor:

Spec OK	Spec out	Sketch in	Sketch out	Finish in	Revise in	APPROVED

Art Specification/Approval Form

[redacted] School Division

Series HOUGHTON MIFFLIN READING Date 10/22/84

Author/Title [redacted]

Selection, chapter [redacted] Page 90

Artwork: ☐ 1/color ☒ 4/color ☐ 2/color Photography: ☐ b/w ☐ color

Description: (include style, mood, purpose, size, any special treatment of other comments)

HELP! This illustration is the last one, and as you can see, it will appear after the story has ended, below the author biography. I'd like to have some kind of "summing up" piece of art here--perhaps the finger spelling of THE END???? (Question marks are for you, not part of the idea!) If you think this will work, please use the reference for the finger spelling chart to spell out those words. Otherwise, let me know what you think might work better. I'd like this piece to be confined within the text block area, since there's going to be so much type on the facing page.

Let's discuss this one before you begin working on it.

Artist or Photographer [redacted]

APPROVALS (It is assumed that the signing party has shown the material to all appropriate members of the Editorial Department.)

Final spec	Sketch	Finish	Final Approval
☐ Approved	☐ Approved	☐ Approved	☐ Approved
☐ Approved with changes	☐ Approved with changes	☐ Approved with changes	
Date:	Date:	Date:	Date:
Editor:	Editor:	Editor:	Editor:

Spec OK	Spec out	Sketch in	Sketch out	Finish in	Revise in	APPROVED

TOTAL P.10

OVERSIGHT HEARING ON COPYRIGHT MORAL RIGHTS IN FILMS, TELEVISION AND OTHER PERFORMING ARTS

TUESDAY, OCTOBER 24, 1989

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS,
Washington, DC.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 226, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the subcommittee) presiding.

Also present: Senators Leahy, Hatch, and Grassley.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. The subcommittee will come to order. Senator Hatch is on his way and we will just commence with opening statements before we hear from witnesses.

Today is the final hearing in a series of three copyright moral rights hearings that are being held by the Subcommittee on Patents, Copyrights and Trademarks. Today's hearing will focus on the subject of moral rights in films, television, and other performing arts.

While the most famous—or perhaps infamous—issue to be addressed today is colorization of movies, there are a number of other specific issues that I would like our witnesses to discuss. In addition, I am looking forward to a more general discussion of the appropriate extent of moral rights on our copyright law.

Last year Congress enacted legislation conforming the U.S. domestic copyright laws to the principal international copyright treaty, the Berne Convention, which was ushered through this body by the Senator from Vermont, who is with us today. The United States joined Berne in March of this year.

In conjunction with adoption of the Berne Convention last year, the House and Senate considered the issue of whether changes were necessary in our domestic copyright law in the area of moral rights in order to conform to the Berne Convention. The decision by both bodies was that no such changes were necessary or required. The official report of the Senate Judiciary Committee says:

> Section 2(3) of the act clarifies that the amendments made by this act, together with the law as it exists on the date of enactment of the act, satisfies the U.S. obligation under article *6bis*, the moral rights provision of Berne, and that no further

rights or interest shall be recognized or created for that purpose. Consequently, the moral rights doctrine is not incorporated into U.S. law by the statute.

I am not sympathetic to those who argue that the Congress must now enact moral rights provisions in our copyright law, nor am I sympathetic to those who argue that by joining Berne we have in effect already enacted moral rights legislation. The question that is presently before us is whether it is appropriate and good national policy to enact moral rights in the copyright law, not whether it is somehow required by our action of last year.

I am interested in hearing our witnesses today discuss the economic and artistic implications of moral rights. I believe we have gathered together a group of witnesses who have the particular experience necessary to discuss the results of such a change in our copyright law.

I want to learn why the artists and creators believe that the addition of moral rights would grant them appropriate and just protection without unfairly restricting the rights of copyright holders and producers. I want to know why the producers believe that granting such protection would prove to be harmful to them and to the viewing public.

I am truly undecided on whether we should adjust the balance built into our copyright laws in favor of the artists. I do believe that the proponents of the change bear the burden of the proof; however, in my judgment, that does not represent an impossible burden to overcome.

There are a number of areas of copyright law that I believe amending, such as the application of the laws to States. At the end of today's hearing I plan to review the record thoroughly, from the record of hearings we have held on moral rights and work made for hire, and decide what I think the subcommittee should do in this area. I will then discuss with and work with the ranking member and my other colleagues on this subcommittee to solicit their views to see what legislation, if any, we should proceed with out of this subcommittee.

I look forward to today's hearing and believe, once again, that we have gathered a very knowledgeable group of witnesses. I want to thank them for taking the time to appear today and, in reviewing some of their statements, to thank them for the comprehensiveness of their statements today.

I now yield to the ranking member, Senator Hatch, who has done a lot of work in this area and who has participated in these hearings from the very beginning.

The Senator from Utah.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman, for holding this hearing today and for your leadership in this matter.

As I stated at our two previous hearings on the subject of moral rights, I believe that the principal purpose of the copyright laws should be to secure and maintain the rights of artists, writers, and other creative individuals. When the copyright law succeeds in this goal, then we all benefit, as artists are then given the necessary

incentives and freedom to create those great works of art which enhance all of our lives.

Therefore, I am happy to have the opportunity which today's hearing presents to again examine the adequacy of the legal protection of the rights of those who are involved in film, television, and the performing arts, and the necessity—if any—for introducing moral rights concepts into American law.

I am interested in preserving a legal structure that stimulates and encourages artists and performers. For that reason I am generally opposed to the imposition of "moral rights" concepts by Federal statute rather than through the bargaining of the parties to a transaction.

In the performing arts, particularly in large-scale collaborative projects such as films, the availability and success of collective bargaining as a tool for securing the rights of the performers has to be acknowledged. Unfortunately, those who question the entire concept of so-called moral rights for artists and writers are sometimes accused of being insensitive to the interests of the creative artist. I don't believe anything could be further from the truth. The objections that have been raised concerning the introduction of moral rights concepts into American law are based on the very real concern that such legislation might depress the healthy American literary, art, and film markets and might dry up available commercial opportunities for young, contemporary artists and writers.

By any measure the current American markets for copyrightable material, whether it be literary, artistic, or in the performing arts, favor the interests of creators more than do the markets of any other country, particularly those European nations which have most fully embraced the concept of noneconomic moral rights. In the film industry alone, the great success of American movies abroad bears testimony to this fact. The market is truly booming. Those who would fundamentally alter this current state of affairs thus bear a significant burden of persuasion.

I am also concerned about questions raised in previous hearings as to the constitutional authority of Congress to enact moral rights legislation under the authority of the copyright clause. Whatever one may think of moral rights for artists, those rights are clearly something other than copyright interests.

I hope that today's witnesses will address these concerns in addition to providing us with the perspective of their respective industries. These are extremely interesting issues to me, and I am going to try to keep an open mind and look at this from every aspect.

So we look forward to hearing the witnesses today. I want to thank you, Mr. Chairman, for accommodating me this morning. I appreciate your holding this hearing.

Senator DECONCINI. Thank you, Senator Hatch.

I now yield to the Senator from Vermont, Mr. Leahy.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Mr. Chairman, I also commend you for convening these hearings on moral rights. As an avid but amateur photographer, I take a particular interest in how creators of works are

treated, but I also believe that creators' rights have to be weighed against the rights of copyright holders and the public interest.

I look forward to hearing from today's witnesses on the issue of whether change in the copyright laws is necessary or fair or practical.

Mr. Chairman, you mentioned joining the Berne Convention in March, and I think that was an extremely important step to protect the rights of American creators. I know Mr. Oman and others agree with me on that. Certainly this country took long enough getting there, and I was glad to be part of the effort that made it possible. The Berne Convention is the oldest and strongest, and I think most effective, international mechanism for protecting copyrights in the global market. Hopefully, our membership will make it harder for those who trade in bootleg copies of U.S. art—whether videotapes, movies, records, books, or anything else—to be able to operate. They have pirated the hard work and investments that go into everything from movies to computer software.

Now, the basic question of moral rights in movies, including colorization, is a very difficult issue. I think that there is a solution out there, though I'm not sure any of the current proposals quite reach it. Last year I was being involved in the compromise that finally brought about the National Film Preservation Board. We have seen that that seems to be starting off well. Just last month, the board announced the first 25 films to be placed in the National Film Registry. I think there is the possibility of a solution regarding moral rights in films, and maybe today's hearings will help.

With that I will hush up so that we can hear from the people here who are most directly affected. Mr. Chairman, as I look around and recognize familiar faces in this room, I realize that not all of them are totally united in what that solution might be. But we know it's a good faith effort and that's why we removed the metal detectors from the doors before we sat you all in the same room. We trust your willingness to work together in "trial by ideas" if not "trial by combat."

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator Leahy.

At this point, without objection, Senator Simpson's and Senator Grassley's opening statements will be placed in the record.

[The aforementioned statements follow:]

STATEMENT OF SENATOR ALAN K. SIMPSON

SUBCOMMITTEE ON PATENTS, COPYRIGHTS & TRADEMARKS

HEARING ON MORAL RIGHTS: OCTOBER 24, 1989

MR. CHAIRMAN, I APPRECIATE YOUR HOLDING THIS HEARING ON MORAL RIGHTS AND THE U.S. COPYRIGHT REGIME. THIS ISSUE HAS TOUCHED US ALL IN SOME WAY, AND I BELIEVE IT IS NECESSARY AND APPROPRIATE THAT THE SENATE ADDRESS IT.

WE ALL BECAME FAMILIAR WITH THE TERM "MORAL RIGHTS" LAST YEAR, WHEN LEGISLATION IMPLEMENTING THE BERN CONVENTION WAS CONSIDERED BY THE JUDICIARY COMMITTEE. I LEARNED THEN THAT, WHILE THE UNITED STATES DOES NOT GRANT EXTENSIVE "MORAL RIGHTS" TO THE CREATORS OF ART WORKS -- THE WAY SOME EUROPEAN COUNTRIES DO -- OUR COUNTRY STILL POSSESSES SUFFICIENT LAWS THAT CONSTITUTE THE MINIMUM ESSENCE OF MORAL RIGHTS NECESSARY FOR MEMBERSHIP IN THE BERN UNION.

WE NOW ADDRESS THE DIFFICULT QUESTION OF WHETHER THE UNITED STATES SHOULD TAKE A STEP TOWARD THE EUROPEANS BY GRANTING ARTISTS SIGNIFICANT NEW "MORAL RIGHTS." I WILL CERTAINLY CONSIDER ALL OF THE INFORMATION COLLECTED BY THIS SUBCOMMITTEE ON THE QUESTION, BUT MY INITIAL RESPONSE IS "NO." THERE ARE SIMPLY TOO MANY BUSINESS AND COMMERCIAL RELATIONSHIPS THAT HAVE BEEN ESTABLISHED BASED ON CURRENT LAW, AND I DO NOT BELIEVE THAT THOSE SEEKING A CHANGE IN THE LAW HAVE DEVELOPED SUFFICIENT PERSUASIVE EVIDENCE TO RECONFIGURE THESE RELATIONSHIPS.

LET ME SAY, HOWEVER, THAT THERE IS ONE AREA IN WHICH I AM VERY INTERESTED THAT MIGHT QUALIFY AS CREATING A NEW "MORAL RIGHT" -- THE COLORIZATION OF BLACK AND WHITE FILMS. I SIMPLY BELIEVE THAT SUCH COLORIZATION IS WRONG; MAYBE EVEN "MORALLY" WRONG. THIS IS A MATTER OF PERSONAL PREFERENCE, AND IT HAS NO STIRRING LEGAL ANALYSIS TO BACK IT UP. HOWEVER, I WILL BE INVOLVED IN LEGISLATION THAT WOULD GIVE FILM DIRECTORS SOME CONTROL OVER THEIR BLACK AND WHITE FILMS, IF A SUBSEQUENT COPYRIGHT OWNER WERE PROPOSING TO COLORIZE THEM. LET ME EMPHASIZE, HOWEVER, THAT I AM NOT INTERESTED IN AFFECTING THE MOTION PICTURE INDUSTRY IN ANY AREA OTHER THAN COLORIZATION. I AM NOT INTERESTED IN "PANNING AND SCANNING," OR IN "TIME COMPRESSION," OR IN ANY OTHER MOVIE ALTERING TECHNIQUE OTHER THAN COLORIZATION.

AGAIN, MR. CHAIRMAN, I APPRECIATE YOUR HOLDING THESE HEARINGS, AND I LOOK FORWARD TO THE INSIGHTS OF THE WITNESSES.

STATEMENT OF SENATOR CHARLES E. GRASSLEY

JUDICIARY SUBCOMMITTEE ON PATENTS, COPYRIGHTS, AND TRADEMARKS

OCTOBER 24, 1989

THANK YOU MR. CHAIRMAN.

I WELCOME THE OPPORTUNITY TO ONCE AGAIN ADDRESS THE ISSUE OF MORAL RIGHTS. I FIND IT PARTICULARY INTERESTING TO HEAR FROM THE ALL THE DIFFERENT ACTORS WHO WORK TOGETHER TO CREATE A FINAL PRODUCT, WHETHER IT IS A MOVIE SEEN BY MILLIONS OF PEOPLE, A BOOK CIRCULATED AROUND THE WORLD, OR A TELEVISION SHOW BROUGHT INTO AMERICA'S HOMES EVERY WEEK.

THE TENANTS OF COPYRIGHT LAW STAND FOR THE PROMOTION OF THE PROGRESS OF SCIENCE AND ARTS AND THAT WE MUST BALANCE THE PUBLIC INTEREST AND THE INCENTIVE OF THE CREATORS.

HOW DO WE PROMOTE SCIENCE AND ART? HOW BEST DO WE PROVIDE FOR THE PUBLIC INTEREST WHILE PROTECTING THE INCENTIVES BY ARTISTS TO CREATE?

THIS HEARING GIVES US A CHANCE TO STUDY WHETHER CONGRESS SHOULD PLAY A ROLE IN THIS AREA. DO MORAL RIGHTS EXIST AND DO THEY CALL FOR LEGISLATIVE PROTECTION? OR SHOULD THESE ISSUES BE ADDRESSED BY THE FREE-MARKET SYSTEM? CAN THESE CONCERNS BE BETTER ATTENDED TO BY COLLECTIVE-BARGAINING OR IN THE CONTRACTUAL ARENA?

28-054 - 90 - 25

Senator DECONCINI. Mr. Oman, the Register of Copyrights, is our first witness. Would you please introduce your people who are with you, Mr. Oman, and proceed with a summary of your testimony? We ask that you do summarize it. We have a number of questions we would like to ask and then get into a discussion of it. Your full statement will appear in the record.

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL; ERIC SCHWARTZ AND WILLIAM PATRY, POLICY PLANNING ADVISORS

Mr. OMAN. Thank you very much, Mr. Chairman. For the record I will introduce Dorothy Schrader, the general counsel of the Copyright Office; Eric Schwartz, policy planning advisor to the Register of Copyrights; and William Patry, policy planning advisor to the Register of Copyrights. I come with my full team today because it is a technical area and one in which I would be able to rely on their expertise, as well as my own.

The topic today, as you mentioned, is one of the more controversial subjects before the subcommittee. Today I would rather not talk about any specific bill pending before the subcommittee; instead, I would like to discuss the issue of moral rights generally for works of the performing arts. Here we are talking about motion pictures, sound recordings, and the like.

As you said, Mr. Chairman, this is the third hearing held by the subcommittee this session regarding moral rights, and rather than talk about the moral rights of attribution and integrity, I would rather focus on two subjects: first, my recommendations to Congress about technological alteration of motion pictures; and second, my assessment of the key legislative issues you may want to look at when you consider any additional moral rights legislation.

Let me say at the outset, Mr. Chairman, that I agree with you entirely that we don't have to do anything more on moral rights because of the requirements of the Berne Convention. What you did last year satisfied those requirements. What you decide to do or not do under the present circumstances must stand or fall on its own merits and not rely on complaints of noncompliance with the Convention.

First let me talk about colorization. You have already heard a lot about computer colorization of films, and I will let that issue rest and defer to my distinguished colleagues who will follow me to the witness stand.

It is a very serious issue, of course, and you will hear a great deal about it this morning. In many ways what people are talking about is the preservation of these important examples of the American cultural heritage. Congress, as Senator Leahy mentioned, took an important step in favor of preservation last year by passing the National Film Preservation Act, and just last month the Librarian of Congress announced the first list of 25 great films to be collected by the Library for archival purposes. So the Film Preservation Act does help in the effort of preservation, but it certainly does not end the debate.

As you know, the Copyright Office issued a formal report on the colorization of motion pictures this spring. With your permission, Mr. Chairman, I would like to submit it for the record. I think it would be a useful discussion to include as part of the record.

Senator DECONCINI. Without objection, we will make that part of the record.

[The material referred to follows:]

TECHNOLOGICAL ALTERATIONS TO MOTION PICTURES AND OTHER AUDIOVISUAL WORKS : IMPLICATIONS FOR CREATORS COPYRIGHT OWNERS, AND CONSUMERS

A REPORT OF
THE REGISTER OF COPYRIGHTS

MARCH 1989

UNITED STATES COPYRIGHT OFFICE
WASHINGTON, D. C.

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TABLE OF CONTENTS

	Page
ACKNOWLEDGMENTS.	i
EXECUTIVE SUMMARY.	iii
CHAPTER 1: INTRODUCTION	1
Scope of the Copyright Office Study	1
Previous Copyright Office Actions	5
Issues Examined in this Report.	9
CHAPTER 2: COPYRIGHT IN THE MOTION PICTURE AND TELEVISION INDUSTRIES	15
Copyright Protection for Motion Pictures and Television Programs.	15
The Nature of Authorship in Motion Pictures	20
CHAPTER 3: POST EXHIBITION ALTERATIONS TO MOTION PICTURES	39
Adoption of Broadcast Standards for Television.	42
Letterboxing.	45
Panning and Scanning.	47
Effects of Panning and Scanning on the Aesthetics of Theatrical Motion Pictures	48
Lexiconning	51
The Effects of Lexiconning on the Aesthetics of Theatrical Motion Pictures	53
Computer Color Encoding	54
Effect of Colorization on the Aesthetics of Black and White Motion Pictures.	58
Future Technologies	60

Page

CHAPTER 4: THE IMPACT OF COLLECTIVE AND INDIVIDUAL BARGAINING ON THE DEVELOPMENT AND DISTRIBUTION OF MOTION PICTURES 63

Copyright Ownership and Preparation of the Motion Pictures for Exhibition. 63

The Directors Guild of America's Basic Agreement. 65

CHAPTER 5: MORAL RIGHTS 77

The Nature of Moral Rights. 77

Moral Rights Under the Berne Convention 78

Moral Rights Under the Copyright Act. 81

Moral Rights in the Case Law. 81

Right to Claim Authorship. 83

Misattribution of Authorship 86

The Right of Integrity 90

State Laws. 96

California 97

Connecticut. 98

Louisiana. 99

Maine. 99

Massachusetts. 100

New Jersey 101

New York 101

Pennsylvania 102

Rhode Island 102

Page

Federal Legislative Efforts 103

Early Efforts to Adhere to the Berne Convention. . . . 103

The General Revision of the 1909 Copyright Act 105

Post 1976 Copyright Act W.I.P.O. Consultations 106

Visual Artists Bills 107

The Berne Implementing Legislation 108

Hearings on Berne Implementing Legislation in the Senate. 110

Hearings on Berne Implementing Legislation in the House 129

Hearings on H.R. 2400 135

Initial House Passage of Berne Implementing Legislation 143

Senate Passage of the Berne Implementing Legislation 146

Final Passage of the Implementing Legislation. 148

The Directors' Claims for Moral Rights 149

The Producer's Response. 153

Copyright Office Analysis. 155

Conclusion 162

CHAPTER 6: FILM PRESERVATION 165

CHAPTER 7: CONCLUSIONS 173

ATTACHMENTS

ATTACHMENT I

Robert W. Kastenmeier and Carlos Moorhead letter to Ralph Oman

ATTACHMENT II

ML-356 -- Notice of Inquiry -- Registration of Claims to Copyright-- Notice of Inquiry; Colorization of Motion Pictures

ML-366 -- Notice of Registration Decision -- Copyright Registration for Colorized Versions of Black and White Motion Pictures

ML-388 -- Request for Information; Notice of Hearing -- Request for Information; Notice of Hearing, New Technology and Audiovisual Works

ML-390 -- Final Regulation -- Copyright Registration for Colorized Versions of Black and White Motion Pictures; Final Rule

ATTACHMENT III

"The Financing of Motion Pictures" prepared by Eric Schwartz, Policy Planning Advisor to the Register of Copyrights

APPENDICES

APPENDIX I -- Written Comments (RM 88-3)

APPENDIX II -- September 8, 1988 Hearing Transcript

ACKNOWLEDGMENTS

I am grateful to many individuals and organizations in the motion picture and other affected industries for their responsiveness and generous cooperation in supplying information for this report. I refer particularly to the American Film Institute, Colorization, Inc., Color Systems Technology, Inc., the Directors Guild of America, Erol's Inc., the Motion Picture Association of America, the National Association of Broadcasters, Quintex Corporation, the Screen Actors Guild, Turner Entertainment Company, and the Walt Disney Company.

Like other Copyright Office reports, the Report of the Register of Copyrights on Technological Alterations to Motion Pictures results from the contributions of many staff who perform such diverse functions as research, writing, typing, reviewing, designing, and printing. Although it is not possible to name all these contributors, I certainly acknowledge the fact and significance of their efforts. I would, however, make special mention of the research, writing, and typing efforts of William Patry and Eric Schwartz, Policy Planning Advisors to the Register. I would also like to thank Vicky George, former Senior Copyright Information Specialist, for her painstaking reconstruction of the transcript of our September 8, 1988 hearing, and Carol Duling, Cynthia White and Sandra Brown of my staff for making the many necessary changes in that transcript.

EXECUTIVE SUMMARY

During the recent, successful effort to adhere to the Berne Convention for the Protection of Literary and Artistic Works, Congress extensively debated the issue of "moral rights" in general, and as applied to the motion picture industry. The term "moral rights" does not refer to a judgment about a work's morality (or lack thereof). Instead, it concerns the personal relationship of the author to his or her work apart from economic rights. Two of the most important moral rights are the author's interest in having his or her authorship of the work acknowledged ("the right of attribution"), and the author's interest in preventing unauthorized alterations in the work that are prejudicial to his or her reputation ("the right of integrity").

In deciding on the form of implementing legislation for Berne adherence, Congress adopted the "minimalist approach," under which only those changes absolutely required to join the Convention would be made to the Copyright Act. With respect to moral rights, after two years of hearings and consultations with

foreign experts, Congress reached the conclusion that the totality of existing U.S. law -- federal, state statutory, and common law -- satisfied our obligations under the Convention to accord moral rights. [1]

Accordingly, under the minimalist approach, Congress decided against amending the Copyright Act in the Berne implementing legislation to provide for a single, unified, federal system of moral rights.

This decision was not, however, based on hostility to moral rights in general, nor to such rights as applied specifically to the motion picture industry. In fact, both Senate and House subcommittees held hearings on colorization and other alterations to motion pictures during the second session of the 100th Congress. In addition, on February 25, 1988, Chairman Kastenmeier and Ranking Minority Member Carlos Moorhead of the House Subcommittee on Courts, Intellectual Property and the Administration of Justice [2] requested the Copyright Office to inquire into the present and future uses of technologies such as computer color encoding (colorization), panning/scanning, and time compression and expansion ("lexiconning"), and how these technologies affect "consumers, artists, producers, distributors

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1. See Berne Convention Article 6bis.

2 The Subcommittee was formerly known as the Subcommittee on Courts, Civil Liberties and the Administration of Justice.

and other affected individuals and industries." We were directed to consult with creators of motion pictures, distributors of motion pictures, broadcasters, consumers, and preservationists.

In order to fulfill this mandate, Copyright Office staff visited two companies engaged in computer color encoding of motion pictures as well as a company that modifies theatrical motion pictures for viewing on television. The staff also interviewed representatives of motion picture companies, Turner Entertainment Company, the Directors Guild of America, and the Screen Actors Guild of America. In response to a Request for Information, we received twenty comments from all industry interests, as well as from scholars, preservationists, and other interested parties. On September 8, 1988, we held a public hearing and received testimony from fourteen witnesses representing a broad spectrum of industry and the public.

This report represents the culmination of our interviews, of our review of the congressional hearings, the statements submitted in response to our Notice of Inquiry, and the testimony received at our September 8th hearing.

The report is comprised of seven chapters and two appendices. The first appendix reproduces the statements submitted in response to our Notice of Inquiry; the second reproduces the transcript of our September 8, 1988 hearing.

Chapter 1: Introduction

After noting the genesis of this report, the introduction provides an overview of previous Copyright Office actions in accepting claims to copyright in colorized versions of black and white motion pictures. It then briefly notes the issues to be examined, including how the use of technologies permitting the alteration of theatrical motion pictures has affected the interests of creators, distributor-copyright owners, and the public.

Chapter 2: Copyright in the Motion Picture and Television Industries

The second chapter of the report reviews copyright protection for motion pictures and television programs in the United States and under the Universal Copyright and Berne Conventions.

The chapter also examines the various claims for authorship in motion pictures, beginning with a review of U.S. case law, the treatment of authorship under the 1976 Copyright Act and the Berne Convention, as well as the national legislation of France, the Federal Republic of Germany, and the United Kingdom.

This review serves as background for a discussion of the position of U.S. motion picture directors that, for purposes of

preventing material alterations to their works, the principal director and principal screenwriter should be considered the "authors" of the motion picture. This position is based on a number of arguments; first, that the principal director is the single individual primarily responsible for the actual composition of the picture; second, that only the principal director and principal screenwriter are involved in "telling the yarn;" and, finally, due to the large number of individuals involved in creating a motion picture, it is impractical to grant rights to everyone; hence, since a line must be drawn somewhere, the principal director and principal screenwriter represent a logical place to draw that line.

We then give the response of academics and motion picture industry representatives to the directors' arguments. Testimony by a law professor that motion picture scholarship has, in recent years, come to recognize the importance of the contributions of several groups of filmmaking professionals (e.g., cinematographers, art directors, and editors) is cited. Testimony from motion picture industry representatives challenging the directors' position is discussed. These representatives assert that for most of the "classic" motion pictures at issue, the studios are more properly regarded as the author. Testimony on the current important role of certain types of producers is also discussed.

The chapter concludes by noting the difficulties faced internationally in determining authorship in cinematographic works and notes that, due to the use of work made for hire arrangements in the United States, the issue generally has relevance only with respect to moral rights, a topic addressed in Chapter 5.

Chapter 3: Post Exhibition Alterations to Motion Pictures

This chapter is divided into two parts. The first part reviews current and projected future technologies used to adapt theatrical motion pictures for viewing on television screens and notes the reason why these adaptations are believed necessary. The second part analyzes the effect of these adaptations on the aesthetics of motion pictures.

The chapter begins with an explanation of the predominance of post-theatrical markets (videocassettes, cable television, and broadcast television) for motion pictures, and the reasons theatrical motion pictures are technologically adapted to be distributed to these markets. The principal technologies are:

Computer Color Encoding. This is a process by which black and white film prints are transferred to videotape and electronically encoded with color.

Pannning and Scanning. This is a process by which motion pictures, composed for viewing ontheatre screens, are altered for viewing ontelevision screens.

Letterboxing. This technique is an alternative to panning/ scanning and permits the original composition of a theatrical motion picture to be retained on television by reducing the size of the image. Letterboxing leaves dark bands at the top and bottom of the screen.

Lexiconning. This technology involves

> the electronic time compression or expansion of a motion picture in order to fit the picture into broadcast time slots.

We then analyze the aesthetic effects that each of these technologies have on theatrical motion pictures. We conclude that colorization has an adverse effect on the aesthetics of black and white motion pictures, and that while panning/scanning has had an adverse effect in the past, such effects have been somewhat ameliorated through the voluntary decision of directors and cinematographers to film theatrical motion pictures within the parameters of television. This decision has, however, also resulted in fewer motion pictures being shot in a widescreen format due to the predominance of the post-theatrical markets. We conclude that lexiconning can have an adverse aesthetic effect on motion pictures but that no information was presented indicating the extent to which it is employed in a manner resulting in an adverse aesthetic effect.

The chapter concludes with a review of future technologies such as High Definition Television and computer generation of characters.

Chapter 4: The Impact of Collective and Individual Bargaining on the Development and Distribution of Motion Pictures

In this chapter, we discuss the nature of collective and

individual bargaining in the motion picture industry. We note that the Directors Guild of America Basic Agreement contains a detailed set of minimum conditions for the preparation, production, post-production stages of motion pictures, and for post-theatrical release editing. Directors are given an absolute right to a "Director's Cut" -- the penultimate form in which the motion picture is released. Directors do not have, and for purposes of legislative reform, have disavowed any desire to obtain the "Final Cut;" i.e., the right to determine the final form of the work as theatrically viewed.

Under the Basic Agreement, however, directors have obtained the right of consultation regarding post-theatrical alterations to motion pictures as viewed on videocassettes, and on cable and broadcast television. We recount the directors' unsuccessful efforts to transform, under the Basic Agreement, the provision that grants them the right of consultation into an absolute right to permit or prohibit such alterations. We also discuss the position of producers that directors should not have such an absolute right. We note that a only a very few directors have obtained the desired rights in their individual contracts.

We then analyze the pros and cons of reliance upon collective and individual bargaining, and question whether the failure of the directors to obtain the rights they seek necessarily indicates a breakdown in labor relations, and one requiring

federal legislation to repair.

Chapter 5: Moral Rights

This lengthy chapter begins with a review of the nature of moral rights, with special emphasis on the Berne Convention and U.S. case law. We review recent state and federal legislative efforts to grant moral rights to works of fine art, as well as the discussions on moral rights during hearings on U.S. adherence to the Berne Convention. We go into the testimony of directors, producers, and computer color encoding companies in detail, as well as the remarks of various Members of Congress.

We then set forth the directors' claims for moral rights legislation, the producers' response to those claims, and conclude with our analysis of the issue.

The directors' claim is based, essentially, on three premises: first, that no artist should have his or her work materially altered without his or her consent; second, that collective and individual bargaining is an inadequate means to obtain the right to prevent material alterations that are injurious to their reputation; and, third, that the public has an interest in viewing motion pictures in their original form.

The proposed rights would be limited to the principal director

and principal screenwriter. All of the other creative collaborators in the motion picture would have to rely on the principal director and principal screenwriter for vindication of their rights. Authors of preexisting works used in motion pictures, such as novelists and composers, would be required to rely on contractual provisions for prevention of unwanted material alterations to their works in the motion picture.

The producers' and "colorizers'" response to the directors' claim rests on the assertion that their activities are consistent with both the purposes of the Copyright Act and the rights they have fairly obtained through collective and individual bargaining. Additionally, they argue that imposition of restrictions on alterations to existing motion pictures would violate the "takings" clause of the Fifth Amendment to the U.S. Constitution. The producers and colorizers reject the directors' attempt to invoke the public interest, arguing that the directors actually seek a right permitting them to insist that the original version be the only version distributed to the public. They note the public's preference for color television viewing, and they point to their preservation efforts in restoring and making available black and white versions of motion pictures along with the colorized version. They stress the critical economic need and benefit of distributing motion pictures in non-theatrical markets. The producers and colorizers deny that collective and individual bargaining are inadequate and that directors should

have the final say over the form in which their works are distributed in post-theatrical markets.

We then analyze these various arguments, concluding as follows.

Proponents of change in the existing law should bear the burden of showing that a "meritorious public purpose is served by the proposed congressional action." If this threshhold is met, Congress is then faced with the "delicate job of bartering between what are often contrary interests."

In analyzing the directors' assertion that a meritorious public purpose is served by protecting the integrity of their works, we note that in adhering to the Berne Convention, the United States has declared that its law satisfies the obligations of the Convention, one part of which is Article 6bis, the moral rights provision. In adhering to the Convention, the United States specifically declared that the totality of existing U.S. law -- federal, state statutory and common law -- provides a level of moral rights protection that at least rises to the minimum level required by Article 6bis. The question of whether moral rights should be unified in a single federal system under the Copyright Act is the subject of dispute, but, after joining the Berne Union, it cannot be denied that the United States recognizes moral rights. Accordingly, the prevention of material alterations to motion pictures in a manner that injures the

reputation of the creative collaborators of the film does represent a "meritorious public purpose," at least on its face.

However, invocation of the public interest by some of the directors gives rise to a degree of ambiguity since they do not, strictly speaking, seek to preserve the original version of motion pictures, but instead seek to obtain rights for individual directors to decide whether the theatrical version should be materially altered.[3]

Additionally, we conclude that if Congress is persuaded that it should vest directors and screenwriters with increased moral rights, then Congress should also include the other creators in the list of beneficiaries. For example, the authors of the underlying works used in motion pictures should get such benefits and should not be forced to rely on contractual protection -- protection which the directors claim is inadequate for vindication of their rights.

Finally, we discuss the likelihood that a violation of the takings clause of the Fifth Amendment would result from the grant of a new federal moral right as applied to existing motion pictures. Given this problem, the issue becomes whether

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3. The ambiguity of this invocation of public interest does not, of course, apply to directors' attempts to prevent material alterations to the works of other directors created during Hollywood's "Golden Era."

legislation is required for future motion pictures, since very few motion pictures are now shot in black and white, and since many theatrical motion pictures are deliberately shot within parameters that ameliorate the need for extensive panning/scanning when the films are subsequently adapted for viewing on television screens. We also discuss the importance of ensuring that new theatrical motion pictures are created, and of protecting the interests of broadcasters, cable systems, and video retailers in subsequently delivering those pictures to the public.

Chapter 6: Preservation

In this chapter we discuss issues of preservation, including the availability of the original version of motion pictures, and the opportunity to view that version in theatrical exhibition, on videocassettes, and on cable and broadcast television. We review the steps taken by various private and public organizations to preserve motion pictures and the approaches that may be taken to better coordinate these various efforts.

Chapter 7: Conclusions

Chapter 7 contains our conclusions. Based on the testimony

before the congressional committees and the Copyright Office, and the various written comments submitted to us in this inquiry, the Copyright Office reached the following conclusions:

(1) The Subcommittee should seriously consider a unified federal system of moral rights;

(2) If a unified federal system of moral rights is adopted, state moral rights protection should be partially preempted. Preemption should apply to rights equivalent to those granted in the amended federal statute but not to nonequivalent rights;

(3) If the Subcommittee prefers an industry-by-industry approach to moral rights, and chooses to zero in on the motion picture industry, the Subcommittee should carefully consider whether the existing web of collective and individual bargaining is adequate to protect directors' legitimate interests;

(4) If the Subcommittee chooses to grant a higher level of moral rights in the motion picture industry than now exists, the Copyright Office could support this effort in principle. This legislation would accord rights only to works created on or after the effective date of the legislation and would be granted to authors of preexisting works used in motion pictures on or after the effective date, as well as to other creative participants in the motion picture (e.g., cinematographers, art directors, editors, and perhaps, actors and actresses).

CHAPTER 1: INTRODUCTION

The Copyright Office has prepared this report at the request of the Chairman of the Subcommittee on Courts, Intellectual Property and the Administration of Justice of the House Committee on the Judiciary, Robert W. Kastenmeier, and ranking minority member Carlos Moorhead. [1]

In their letter of request, sent in recognition of the extraordinary cultural and economic importance of motion pictures, Chairman Kastenmeier and Mr. Moorhead asked the Office to inquire broadly into the present and future use of technologies in the motion picture industry -- technologies such as computer color encoding ("colorization"), panning and scanning, and time compression and expansion ("lexiconning") -- and how they affect "consumers, artists, producers, distributors and other affected individuals and industries." They asked the Office to consult with the creators of motion pictures, the distributors of motion pictures, and the broadcast industry, as well as "other commercial interests that exploit such works or own copyright interests in them, and with consumers, archivists, academics and appropriate governmental agencies... ."

Scope of the Copyright Office Study

On May 25, 1988, the Office published in the Federal Register a

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[1]. Letter of February 25, 1988 to Ralph Oman, Register of Copyrights, U.S. Copyright Office, reprinted in the Appendix. The subcommittee was formerly known as the Subcommittee on Courts, Civil Liberties and the Administration of Justice.

Request for Information and a Notice of Hearing. [2] In addition to requesting information describing the aforementioned technologies, the Office solicited comments in four areas: (1) nature and impact of the technology; (2) contractual practices; (3) foreign practices; and, (4) possible future legislative action. [3]

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[2]. 53 Fed. Reg. 18937-18938 (May 25, 1988).

[3]. The areas of inquiry and specific questions examined are as follows:

(1) A description of the technologies of colorization, time compression and expansion, and panning and scanning and how these technologies are utilized after the creation of a motion picture (so called post-production changes) and other audiovisual works and the reasons these techniques are used. Are these technologies used for example, to enhance the commercial value of the film? Are there possible aesthetic considerations -- both for the use and prevention of the use of these technologies? What is the impact of the use of such techniques on both the economic rewards flowing to the creators of films and the producers of such films?

(2) What is the present extent of the use of the technologies and what is the present impact of the technologies on those involved in the distribution of the original and the altered versions of the work? What is the projected future use and impact of these technologies and any new technologies currently in the planning or development stages?

(3) How do existing contractual practices (both private contracts and collective bargaining agreements) between creators and producers govern the use of these techniques? What about contracts between producers and their assignees, such as broadcasters or intermediary-distributors? Are there differences in contract provisions negotiated by established creators and those negotiated by lesser-known artists?

(4) Is it possible to identify the creative interests affected by these techniques with any precision? What is the present status of such interests under copyright law in relation to the audiovisual works they create? Would new provisions in the Copyright Act, such as new moral rights provisions, be required to accord to such creators a means to control or influence the use of these technologies in relation to their work? What public policy considerations are involved?

(5) Have foreign countries addressed any of the issues raised by these new technologies, and if so, how are these foreign practices relevant or applicable to practices in the United States?

(6) What, if any, is the impact of the use of such techniques on the public's access to audiovisual materials? Do these techniques essentially

In response to the Request for Information, the Office received twenty written comments from the following groups and individuals: (1) Society for Cinema Studies; (2) Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law (Munich, Federal Republic of Germany); (3) Color Systems Technology, Inc.; (4) Turner Broadcasting System, Inc.; (5) the Motion Picture Association of America, Inc.; (6) Quintex Entertainment, Inc. (Colorization, Inc.); (7) Professor Peter Jaszi; (8) the Directors Guild of America; (9) American Movie Classics; (10) Erol's Inc; (11) Video Treasures, Inc. and Video Cassette Sales, Inc.; (12) Donald L. Pevsner, Esq.; (13) International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (IATSE); (14) George Stevens, Jr.; (15) National Broadcasting Company, Inc.; (16) National Association of Broadcasters; (17)

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extend potential distribution of works by creating new commercial opportunities for public exploitation? Do these techniques have the effect of crowding out of the marketplace original versions of pre-existing works? Do these techniques affect the profitability of broadcasting or other distribution enterprises so as to permit them to acquire new works of other authors?

(7) Notwithstanding the answers to any of these questions, is there an overriding public policy problem posed by the unchecked use of these technologies? Are nationally and internationally recognized "classics" of American cinema being lost in their original form to future generations? What is, and what should be the government's role in the preservation of works? Should it be all works or is it, in fact, possible to distinguish among audiovisual works so as to protect such classic works from any negative effects of these techniques and practices? Do the subsequent changes made to works misrepresent or unreasonably diminish the artistry involved in creating such classics?

(8) Finally, is a legislative solution to these issues appropriate, or would voluntary agreements (among the concerned parties or by industry agreement or code of conduct) suffice? If legislation is the best solution, what form should it take?

Morality in Media, Inc.; (18) American Film Technologies, Inc.; (19) Filmlife, Inc.; and (20) National Center for Film and Video Preservation of the American Film Institute. [4]

To better understand the technologies and current practices in the motion picture industry, the Copyright Office sent two staff members to Toronto, Canada, where they received a demonstration of the computer color encoding process used by Colorization, Inc. They also visited Los Angeles, California, and interviewed representatives of Color Systems Technology, Inc. (and received an in-depth demonstration of its computer color encoding process), as well as American Film Technology, Inc. (another computer color encoding company), Turner Entertainment Company, Walt Disney, Inc., the Alliance of Motion Picture and Television Producers, the Directors Guild of America, the Screen Actors Guild of America, directors Elliot Silverstein and Sydney Pollack, and finally AME, Inc., a company which specializes in film to videotape transfers using panning and scanning techniques, where they witnessed a demonstration of that technology.

Pursuant to the May 25, 1988 Federal Register notice, the Copyright Office held a public hearing in the Library of Congress on September 8, 1988. Testimony was taken from fourteen witnesses representing a broad spectrum of interests, including computer color encoding companies, motion picture companies, distributors, directors, video retailers, film preservationists, and academicians. [5]

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[4]. These statements are reprinted as Volume II of this report.

[5]. A transcript of the hearing is reproduced as Volume III of this report.

In order of appearance (and grouped by panel), the witnesses were: (1) "Colorization" Panel: Joseph Adelman (Color Systems Technology) with Jon Baumgarten, counsel; Bernard Weitzman (American Film Technology); and, Rob Word (Quintex Corporation, Colorization, Inc.); (2) Roger Mayer (Turner Entertainment Company); (3) Arnold Lutzker, Esq. (Directors Guild of America); (4) Joshua Sapan (American Movie Classics, cable television channel); (5) Preservation Panel: George Stevens, Jr. and John Belton (Society for Cinema Studies); (6) Video Retailers Panel: Vans Stevenson (Erol's, Inc.) and Burton Wides, Esq. (Video Software Dealers Association); (7) Academic Panel: Professor Peter Jaszi (Washington College of Law, American University); and, Dr. Thomas Dreier and Silke von Lewinski (Max Planck Institute for Foreign and International Patent, Copyright, and Unfair Competition Law, Munich, Federal Republic of Germany).

Previous Copyright Office Actions

The present study is, at least in part, the result of the Copyright Office's 1987 decision to accept, on a class basis, claims to copyright in computer color encoded versions of black and white motion pictures and television programs. [6] In light of this decision, it is appropriate to review briefly that history.

Between 1985 and 1986, several parties submitted claims to copyright in computer color encoded versions of black and white motion pictures and

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[6]. 52 Fed. Reg. 23443-23446 (June 22, 1987).

television programs. To assist it in developing practices regarding these claims, the Copyright Office published a Notice of Inquiry in the Federal Register on September 15, 1986, soliciting public comment and technical information on the computer color encoding process. [7]

The Notice stated the Office was "aware of sharply held differences of view on the aesthetic consequences of colorizing previously distributed black and white film." The Notice cautioned, however, that while the Copyright Office would follow that debate with interest, issues such as whether colorization "risks 'mutilating' the conscious artistry of black-and-white cinematographers...can not and do not form any part of this present inquiry." [8]

The reason for this position is simply stated and firmly rooted in the case law: in determining copyrightability, it is not the role of the courts or the Copyright Office to pass judgment on the aesthetic value of a work. As Justice Holmes stated in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-252 (1903):

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their

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7. 51 Fed. Reg. 32665-32667 (Sept. 15, 1986).

8. Despite this caveat, many of the forty-six written comments focused on the aesthetic merits of computer color encoding.

> author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet, if they command the interest of any public, they have a commercial value - it would be bold to say that they have not an aesthetic and educational value - and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.

Original works of authorship, including computer color encoded versions of black and white motion pictures that meet the legal and formal requirements of the Copyright Act, are entitled to registration, regardless of their aesthetic or artistic value. Congress, naturally, may amend the Copyright Act to prohibit copyright in "objectionable works," but for good reason it has never indicated a desire to do so. Such a radical reversal of current law should be undertaken, if at all, only after thorough review of the many adverse consequences that would inevitably result from such a step.

On June 22, 1987, the Copyright Office issued a Notice of Registration Decision. [9] The Notice informed the public that, after having reviewed the comments, the Office concluded some computer color encoded motion pictures and television programming may contain sufficient authorship to justify registration as derivative works. Of course, the copyright in such a derivative work has no effect whatsoever on the copyright status of the preexisting black and white work. 17 U.S.C. Sec. 103(b)(1978).

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[9]. 52 Fed. Reg. 23443-23466 (June 22, 1987).

The Notice further announced that the Office would apply the same standard in determining whether the color added to a black and white motion picture or television program satisfies the requirements for registration as is currently applied to all other derivative works: that is, whether the modifications, taken as whole, represent an original work of authorship. [10] This standard is taken directly from the statute, 17 U.S.C. Sec. 101 (1978)(definition of "derivative work") and from the Committee on the Judiciary's conclusion in 1976 that the statutory phrase "original works of authorship" "is intended to incorporate without change the standard of originality established by the courts under the present [1909] copyright statute." [11]

Two days later, on June 24, 1987, the Copyright Office issued a proposed deposit regulation for claims to copyright in computer color encoded versions of black and white motion pictures and television programming. [12] Only six comments on the proposed regulation were received.

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10. The Notice enumerated five criteria the Office would apply in determining whether the coloring of a particular black and white film is a modification that satisfies this statutory standard of new authorship. The criteria to be used are:

(1) Numerous color selection must be made by human beings from an extensive color inventory;
(2) The range and extent of colors added to the black and white work must represent more than a trivial variation;
(3) The overall appearance of the motion picture must be modified; registration will not be made for the coloring of a few frames or the enhancement of color in a previously colored film;
(4) Removal of color from a motion picture or other work will not justify registration;
(5) The existing regulatory prohibitions on copyright registration based on mere variations of color is confirmed.

11. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 51 (1976).

12. 52 Fed. Reg. 23691-23692 (June 24, 1987).

On August 9, 1988, the Office adopted a final deposit regulation. [13] The regulation adheres to the proposed requirement that a copy of the black and white version of the work be deposited when registration is sought for computer color encoding, and specifies that the black and white copy be an archival quality print where one is available. [14]

The Office based its authority to require deposit of a copy of the preexisting black and white work -- in addition to a copy of the computer color encoded work when registration is sought for the latter -- on both its general rulemaking authority and the authority given to the Register of Copyrights to specify by regulation the "nature of the copies or phonorecords to be deposited in the various classes... ." [15] The Office concluded that the deposit of a black and white print would facilitate the examination necessary to determine whether a computer color encoded version represents more than a trivial variation from the underlying black and white work, and would also "enrich the collections of the Library of Congress for the benefit of the public and posterity."

Issues Examined in this Report

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13. 53 Fed. Reg. 29887-29890 (Aug. 9, 1988).

14. The order of preference is that followed in the "Best Edition Statement" of the Library of Congress, and will usually be a 35mm print. The Motion Picture Agreement, developed in 1941 by the Library of Congress and motion picture copyright owners, is designed to encourage registration of theatrical motion pictures while allowing a registrant to keep copies of the print in circulation while the motion picture is being initially exhibited. The Motion Picture Agreement would not apply to the colorized versions because they are not being exhibited theatrically, and are on videotape.

15. See 17 U.S.C. Secs. 408(c)(1), 702 (1978).

The issues raised by computer color encoding of black and white films are but the latest manifestation of a centuries-old interplay between creativity, copyright, and technology: between the need to encourage authors to create works, the need to provide a framework within which lawful distributors of works can successfully market them to the public, and the desire of the public to have access to works of authorship in a convenient and affordable manner. The Supreme Court recently noted that "[f]rom its beginning, the law of copyright has developed in response to significant changes in technology." [16]

By their very nature, the technologies involved in this report pose new problems, but the introduction of technologies that affect the rights of creators and the marketplace is not new. As in the past, in keeping with the constitutional goal of encouraging the promotion of the progress of science, any solution to the problems posed by such technologies must carefully balance the rights of all interests involved: the artistic creators, copyright owners (e.g., producers, studios), distributors (e.g., broadcasters, video retailers), and the public.

The technologies at issue here are important to copyright owners of theatrical motion pictures because they allow exploitation in other markets, e.g., broadcast television, cable television, home videocassette, and airlines. The artistic creators of motion pictures argue that these technologies have materially altered the aesthetic value of their

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16. Sony Corporation of America, Inc. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984).

contributions. The public's interest is in having access to works of authorship, including, arguably, both the newer altered version and the original, unaltered version of the work.

In Chapter 3, we discuss these technologies in detail; however, by way of preface, we briefly summarize them here.

Computer color encoding ("colorization") is a process that uses computer technology and standard video signal processing to transform a black and white video signal into color. First, a new one-inch tape of the black and white film is made from a 35mm print. Next, each individual shot in the motion picture is identified and catalogued. The encoding company's artistic director then adopts an overall look and color selection for the entire film. In order to accomplish this selection, a "storyboard" -- a visual presentation of key shots -- is created. Next, each individual shot is color encoded. The color is then balanced from one scene to the next, and ultimately within the entire work.

Colorization is currently used only for videocassettes and television broadcasts. While there are no plans to use the process for theatrical exhibition, such an application may arise in the future with further improvements in technology and the existence of a viable marketplace.

Panning and scanning is a process by which motion pictures, created for the wide theatrical screen, are adapted for broadcast on television screens. This process involves reconciling the larger theatrical "aspect ratio" (ratio of width to height) to the smaller space available on a

television screen. In the case of theatrical motion pictures shot in 1.66, 1.75, or 1.85:1 aspect ratios, little of the original image is lost in the transfer to the 1.33:1 aspect ratio of television; however, what was a close up in the theatre becomes a medium close up on TV; what was a medium shot in the theatre (waist up) becomes a three-quarter shot (knees up) on television. In the case of larger theatrical aspect ratios, though, the image loss can be significant.

To retain as much of the essential parts of the original theatrical image as possible, panning and scanning is used. [17] First, a film to tape transfer is made on a "telecine machine." A telecine operator then views the tape image on a video monitor and, in essence, electronically reframes the shot within the television parameters. Generally, the operators attempt to follow the central action, focusing on whoever is speaking, or, on the movements of the characters.

Time compression or expansion ("lexiconning") involves the actual speeding up or slowing down (without appreciably altering the voices) of films when screened on television, or, (much less often), when transferred to videotape. The film is viewed at a rate faster or slower than the standard theatrical rate of 24 frames per second. Lexiconning is used little, if at all, outside of commercial television, which adheres to "on-the-hour" and "on-the-half-hour" time slots. The purpose of lexiconning is to reduce the need to edit or insert additional scenes.

Later in this report, we examine other technologies, such as High-

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17. An alternate approach to this problem, known as "letterboxing," is discussed below in Chapter 3.

Definition Television and computer generation of images.

The critical point is not the mechanics of any particular technology, or necessarily whether the technology is new or old, [18] but rather whether the use of the technology affects a work's aesthetics and whether it impedes access to the original, unaltered version of the work.

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18. This point is demonstrated by directors' complaints about the routine deletion of substantial parts of their works for broadcast on television and exhibition on airlines, deletions that may have as deleterious an effect on the aesthetics of the work as the new technologies. See generally, Ginsburg, The Right of Integrity in Audiovisual Works in the United States, 135 R.I.D.A. 2 (1988); Kerever, The Insertion of Advertising in Films Screened on Television, 32 COPYRIGHT BULLETIN 10 (1988).

CHAPTER 2: COPYRIGHT IN THE MOTION PICTURE AND TELEVISION INDUSTRIES

Due to the collaborative nature of filmmaking and its extensive use of preexisting works, such as novels and musical compositions, the number of parties affected by copyright in the motion picture and television industries goes beyond the archetype of author, publisher, and public. In this chapter, we examine these complex relationships. We begin with a brief history of copyright protection for motion pictures and television programming.

Copyright Protection for Motion Pictures and Television Programs

Section 106 of the Copyright Act of 1976 grants certain exclusive rights in original works of authorship, including "motion pictures and other audiovisual works." [19] The term of protection is the same as that granted

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19. 17 U.S.C. Sec. 102(a)(6)(1978). Motion pictures are defined as "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any." 17 U.S.C. Sec. 101. Audiovisual works are defined as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." Id. The 1909 Act had no definition of these terms. Compendium I of Copyright Office Practices contained the following definition: "A motion picture is a series of pictures presenting to the eye the illusion of motion, which pictures are projected on a screen or transmitted by means of television or otherwise, and have as their origin a series of connected pictures on film or other

to all other works of authorship; however, given the fact that motion pictures are generally created under work made for hire agreements, the usual term is that provided in Section 302(c): to wit, seventy-five years from the year of first publication or one hundred years from creation, whichever expires first.

The history of copyright for motion pictures may be traced to the late 1890s and early 1900s, when they were protected as photographs. [20] Protection for motion pictures as photographs continued under the 1909 Act, as originally codified. [21] Three years later, however, under the amendatory Act of August 24, 1912, 37 Stat. 488, motion pictures were expressly protected as either "motion-picture photoplays" or "motion-pictures other than photoplays." The first category, registered in class 1, was reserved for motion pictures that were dramatic in character and told a connected story. The second category, registered in class m, was reserved for newsreels, travelogs and the like. Television programs were later accepted for registration in the appropriate motion picture category.

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recording media." Chapter 2, Part 2.14.1.

20. See Edison v. Lubin, 122 F. 240 (3d Cir. 1903), appeal dism'd, 195 U.S. 625 (1904)(motion picture of launching of yacht held protectible under Act of 1870 as a single photograph; originality was found in its "artistic conception and expression. To obtain it requires a study of light, shadows, general surroundings, and a vantage point adapted to securing the entire effect."); American Mutoscope & Biograph Co. v. Edison, 137 F. 262 (C.C.D.N.J. 1905)(series of pictures telling a connected story similarly protected); Harper Bros. v. Kalem Co., 169 F. 61 (2d Cir. 1909), aff'd on other grounds, 222 U.S. 55 (1911).

21. See 17 U.S.C. Sec. 5(j)(1909).

In expressly protecting motion pictures under the amendatory Act of 1912, the congressional reports stated:

> The occasion for this proposed amendment is the fact that the production of motion-picture photoplays and motion-pictures other than photoplays has become a business of vast proportions. The money invested therein is so great and the property rights so valuable that the committee is of the opinion that the copyright law ought to be so amended as to give them distinct and definite recognition. [22]

There is evidence of another motive for the amendatory act -- that of limiting the liability of motion pictures for infringement of "undramatized" or "nondramatic works." [23] Yet a third reason for the amendment -- ease of classification by the Copyright Office -- has also been suggested. [24]

International Conventions

1. Universal Copyright Convention

Article I of the Universal Copyright Convention provides that each contracting state "undertakes to provide for the adequate and effective

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22. H.R. Rep. No. 756, 62d Sess. 1 (1912); S. Rep. No. 906, 62d Cong., 2d Sess.1 (1912).

23. See id., and Townsend Copyright Amendment: Complete File of Arguments Before the Committee on Patents on H.R. 15263 and H.R. 20596, 62d Cong., 2d Sess. (1912).

24. See Study No. 3, The Meaning of "Writings"in the Copyright Clause of the Constitution, 86th Cong., 1st Sess. 43, 76 (Comm. Print 1960).

protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works...." There is no special provision governing the term of protection for cinematographic works, thus leaving national legislation to grant a term within the rules provided by Article IV(2). The general rule requires a term of life of the author plus 25 years; however, countries that measure term from the date of first publication must grant a term of at least twenty-five years from first publication or from registration prior to publication.

2. The Berne Convention for the Protection of Literary and Artistic Works

Cinematographic works were first protected under Articles 14(2) and (3) of the 1908 Berlin Revision. Article 14(2) provided:

> Cinematographic productions shall be protected as literary or artistic works if, by the arrangement of the acting form or the combination of the incidents represented, the author has given the work a personal and original character.

This provision "regarded [cinematographic works] simply as another species of dramatic work, and little, if any, account was to be taken of the technical skills required to make them...." [25]

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25. Ricketson, **The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986** at p. 550 (1987)("Ricketson"). See also id. at 551-562 for discussion of subsequent revisions and proposals.

Article 14(3) provided:

> Without prejudice to the rights of the author of the original work, the reproduction by cinematography of a literary, scientific or artistic work shall be protected as an original work.

Unlike Article 14(3), this provision protected cinematographic works in their own right. The 1971 Paris text of Berne, to which the United States adheres, combines the two Berlin revisions into a single provision, found in Article 14bis(1): "Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights in the preceding Article." [26] Article 7(1) provides the basic term of protection of life of the author plus fifty years. Article 7(2), however, permits countries, in the case of cinematographic works, to provide that the term of protection shall expire "fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work,

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26. See also Article 2(1) listing cinematographic works as encompassed by "literary and artistic works" and WIPO GLOSSARY OF TERMS OF THE LAW OF COPYRIGHT AND NEIGHBORING RIGHTS at 35 (1981)(defining "cinematographic work" as: "Any sequence of images recorded successively on an appropriate sensitive material, mostly accompanied by sound, for the purpose of being shown as a moving picture.").

fifty years after the making." [27]

The Nature of Authorship in Motion Pictures [28]

Case Law in the United States

There is little U.S. case law on the nature of authorship in motion pictures. In Edison v. Lubin, 122 F. 240, 242-243 (3d Cir. 1903), appeal dism'd, 195 U.S. 625 (1904), the court held that a motion picture of the launching of Kaiser Wilhelm's yacht "Meteor" embodied:

> artistic conception and expression. To obtain it requires a study of light, shadows, general surroundings, and a vantage point adapted to securing the entire effect. In Bolles v. The Outing Company, 77 F. 966 (2d Cir. 1897), depicting a yacht under full sail was held to constitute an original work of art; and in view of the recent decision of the Supreme Court (Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 ... 1903) in reference to the character, in that regard, of a circus poster, we have no question that the present photograph sufficiently fulfills the character of a work of the fine arts.

Two years later, in American Mutoscope & Biograph Co. v. Edison Mfg.

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27. See **W.I.P.O Guide to the Berne Convention** at 46-47 (1978); **Ricketson**, supra at 566-569.

28. For simplicity's sake, we do not separately discuss the nature of authorship in television programming. It is generally recognized that unlike motion pictures, television programming is a "producer's medium." See testimony of Rob Word, Quintex Corporation before the Copyright Office, September 8, 1988 hearing. Transcript at 38.

Co., 137 F. 262, 266 (C.C.D.N.J. 1905), a motion picture of staged scenes occurring at and around Grant's Tomb was held copyrightable because the

> pictures express the author's ideas and conceptions embodied in the one story. In that story, it is true, there are different scenes. But no one has ever suggested that a story told in written words may not be copyrighted merely because, in unfolding its incidents, the reader is carried from one scene to another.

Cases under the 1909 Act do not appear to have delved into the nature of motion picture authorship. In Epoch Producing Corp. v. Killiam Shows, Inc., 522 F.2d 737 (2d Cir. 1975), a case involving D.W. Griffith's film "Birth of a Nation," the parties extensively briefed the issue, but the court of appeals based its dismissal of Epoch's claim that Griffith was its work made for hire employee on factors other than the nature of Griffith's contributions.

Authorship in Motion Pictures Under the 1976 Copyright Act

During the revision process leading to passage of the 1976 Copyright Act, issues involving motion pictures and other audiovisual works centered on nonauthorship questions such as infringement by exhibition, the making of ephemeral copies, copyright in transmissions of live broadcasts that are simultaneously taped, termination of transfers, and work made for hire. This

is also true of the legislative reports accompanying the Act. [29]

The Copyright Office's regulations under the 1976 Copyright Act [30] do not contain any discussion on point. **Compendium II of Copyright Office Practices** makes only one reference:

> A motion picture may embody the contributions of many persons whose efforts are brought together to make a cinematographic work of authorship. Some examples of copyrightable elements might be camera work, directing, editing, sound engineering, and other cinematographic contributions. By contrast, mere mechanical acts cannot serve as the basis for copyright registration; for example, a claim based on conversion from 35-mm film to one-half-inch videocassette is not subject to registration. [31]

Likely reasons for the paucity of legal commentary on the nature of authorship in motion pictures in the United States are the work made for hire doctrine and the early dominance of the industry by the studios. These two reasons are, moreover, related. Under the studio system, large numbers of script writers, directors, actors, and other creative contributors were retained on a salaried basis, and the studio accordingly would have been

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29. See H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. (1976)(Conference report); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975).

30. 37 C.F.R. Secs. 201-308.

31. Chapter 4, Sec. 480.03. See also Copyright Office Circular R45 at 6: "The production of a motion picture nearly always begins with some broad ideas and concepts which the various creators...then proceed to embody in a number of different concrete forms of creative expression: dialogue, dramatic action, camera work, visual effects, editing, music and so forth."

regarded as the employer for hire. [32]

Even outside of the studio system, directors and others were, of course, required to sign employment contracts for specific films. These contracts typically contained work made for hire clauses.

While the studio system no longer prevails, work made for hire does.[33] Under this system, directors, screenwriters, cinematographers, and others typically enter into work made for hire agreements with producing or distributing company in exchange for substantial compensation. During the omnibus revision of the 1909 Act, screenwriters and composers attempted to alter the work made for hire doctrine by proposing adoption of something similar to the "shop right" doctrine of patent law. Under this approach, the employer acquires the right to use the work for purposes of his or her regular business, but the employee retains all other rights that do not compete with the employer. Congress, however, rejected the proposal:

> [W]hile this change might theoretically improve the bargaining position of screen-writers and others as a group, the practical benefits that individual authors would receive are highly conjectural. The presumption that initial ownership rights vest in the employer for hire is well established in American copyright law, and to exchange that for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but would also reopen a number of

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32. See 17 U.S.C. Sec. 26 (1909 repealed 1978); Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640 (SDNY), aff'd, 457 F.2d 1213 (2d Cir. 1970), cert. denied, 409 U.S. 997 (1972)(musical composition "Who's Afraid of the Big Bad Wolf" used in motion picture cartoon "Three Little Pigs" created by Walt Disney staff pianist).

33. See second subdivision of the definition of "work made for hire" in Section 101 of the 1976 Act, which includes contributions to motion pictures.

other issues. [34]

Following rejection of this proposal, nothing further was mentioned about authorship or ownership in motion pictures. However, the Berne Convention and some foreign statutes contain provisions on ownership of cinematographic works, which may be profitably examined.[35]

Article 14bis(2)(a) of the Berne Convention provides: "Ownership of copyright in a cinematographic work shall be a matter for legislation in the

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[34]. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 121 (1976); S. Rep. No. 94-473, 1st Sess. 104-105 (1975).

[35]. The Universal Copyright Convention does not contain any special provisions on ownership of cinematographic works. Article I provides generally that protection must be granted to the rights of "authors and other copyright proprietors." In his treatise on the Convention, Arpad Bogsch, Director General of the World Intellectual Property Organization, explains:

> The fact that the Convention does not refer only to authors but also to "other copyright proprietors" seems to have at least two good reasons.
>
> The first reason is that "author" has a different meaning in the various copyright laws of the world. Some countries recognize as authors only physical persons, others recognize also legal entities. In the case of works made by an employee in the course of his employment, some countries recognize the employer, others the employee as author. The question of who is the author or are the authors of a photograph or a motion picture belongs among the most controversial problems of copyright law and the replies may considerably vary from one country to another. ... (second reason omitted).

Bogsch, The Law of Copyright Under the Universal Copyright Convention 7 (3d ed.1968).

country where protection is claimed." The W.I.P.O Guide to the Berne Convention explains that such owners "may be the maker in his own right, as under the 'film copyright' system, or the maker by reason of a legal assignment, or it may be the various artistic contributors to the film. National legislation is free to adopt any of the systems." [36] The term "maker" is, absent proof to the contrary, considered to be "[t]he person or body corporate whose name appears on a cinematographic work in the usual manner." [37]

These provisions have an extensive and controversial history due to the widely differing approaches taken in national laws. [38] The "film copyright" system, found generally in common law countries (including the U.S.), vests all rights in one person or entity, typically the producing or distributing company. The "legal assignment" system vests ownership rights only in the natural persons who contribute to the film, but establishes a statutory assignment of exploitation rights to the producer. A variant on this system establishes a presumption that such an assignment has taken place.

These different approaches to ownership of cinematographic works led to problems in exploitation across national boundaries, a problem that was solved within Europe with respect to television programs by a 1958 agreement concluded under the auspices of the Council of Europe, which adopted the

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36. W.I.P.O. Guide at 85.

37. Article 15(2).

38. See Ricketson at 572-589.

presumption of assignment system. This agreement led to initiatives to include similar provisions in the Berne Convention. After considerable debate and study, [39] the current provisions found in Article 14bis were agreed upon.

In addition to the provisions of Article 14bis(1) quoted above, Article 14bis(2) subsections (b)-(d) contain a special provision for authors of preexisting works used in cinematographic works created in countries that regard such authors as co-authors of the cinematographic work. [40] Under this provision -- called a "presumption of legitimation" -- authors of preexisting works who have consented to the adaptation of their work in a motion picture may not, in the absence of an agreement to the contrary, object to enumerated forms of exploitation of the motion picture. [41] The purpose of the provision is to give film companies "complete freedom to do everything needed to ensure the international circulation of their films." [42]

Article 14bis(3) states that these provisions do not apply to "authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof." If, however, national law does not make the presumption of legitimation binding

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39. See Ricketson at 574-582

40. The question of the moral rights of authors of such preexisting works is critical to this study, and is discussed in Chapter 5.

41. These forms are: reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, and the subtitling or dubbing of texts.

42. W.I.P.O. Guide at 87.

on the principal director, the country must notify the Director General of the World Intellectual Property Organization, who will then notify the countries of the Union. The purpose of this provision is to "take[] into account those countries which treat the director as merely another employee of the film company" and to exclude from the presumption "authors whose works...can enjoy an existence other than in the film itself. ..." [43] The Guide explains, however, that the presumption does apply to:

> assistant producers and directors, those responsible for decor, costumiers, camera-men and cutters, and also to actors, to the extent that some countries treat them as co-authors of the film. It was agreed in Stockholm (1967) that no country in the Union which gives the copyright in films to the artistic contributors may adopt a law which does not allow for such a presumption of legitimation. In other words it is binding on all the countries concerned.
>
> National legislation does however remain free to provide that authors must share in the proceeds of the exhibition or other exploitation of the films to which they contributed.

In his thorough review of these provisions, Ricketson notes that they have been described as " 'devoid of practically any real substance,' " a description he agrees with, adding: "The purpose ... was the production of a uniform international code to regulate exploitation of cinematographic works so as to promote the free circulation of films. This objective was hardly achieved, and the provisions adopted are the most obscure and least

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[43]. Id. at 89.

useful in the whole Convention." [44]

The W.I.P.O Guide commentary on Article 14 understandably contains a more neutral discussion:

> The rules [on ownership] were formulated at the Stockholm Revision (1967); they gave rise, both in Stockholm and during the preparatory meetings, to much discussion and protracted negotiations. The result is Articles 14 and 14bis.
>
> Their objective is to facilitate the international circulation of films and, to this end, to seek to bring closer together, if not unify, the legal theories on the subject in the various countries of the Union. Basically there are three different legal systems.
>
> The "film copyright" system in which only the maker is the first owner of the copyright in the film (and not the producer, director, cameraman, etc.), but in which the rights in those works which go to make up the film and which enjoy an existence apart from the film (scenarios, script, music, etc.) belong without restriction, to their authors, from whom the film-maker must acquire them by contract, express or implied. In other words these authors enjoy copyright in their respective contributions and grant the maker of the film permission to use them. On the other hand, the latter owns all the copyright in the film itself and is therefore free, subject to any contractual stipulations to the contrary, to exploit it as he wishes.
>
> A system in which the film is treated as a work of joint authorship of a number of artistic contributors (sometimes, but not always, listed in national law) from whom the maker must take assignments of their contributions in order to be able to exploit the film.
>
> The system called "legal assignment" which also treats the cinematographic work as one of joint

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[44]. Ricketson at 582. See also id. at 589.

> authorship but where the national law presumes a contract with the maker, assigning the right to exploit the film.
>
> Since the Convention governs international situations, the problem was how to build a bridge between the systems without entirely ruling any of them out; this was done in Stockholm (1967) by adding a rule covering the interpretation of contracts known as the "presumption of legitimation." This wedding of legal systems made a distinction between the author's pre-existing works (on which the film was based and from which it is adapted) and those of contributions which only come into existence during the making of the film. Article 14 governs the first and Article 14bis the second. [45]

To see how national legislation has treated the ownership question, we shall examine the laws of three prominent Berne member countries: France, the Federal Republic of Germany, and the United Kingdom. [46]

France

The French Copyright Law of 1957, as amended in 1985, contains numerous provisions on cinematographic works. [47]

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[45]. **W.I.P.O. Guide** at 82-83. For similar reasons, the Berne Convention does not define the more general term "author." See **W.I.P.O. Guide** at 11: "The Convention speaks of 'the rights of authors in their works' but it does not specifically define the word 'author' because on this point ... national laws diverge widely, some recognising only natural persons as authors, while others treat certain legal entities as copyright owners, some imposing conditions for the recognition of authorship which others do not accept."

[46]. For a review of the laws of Latin American countries, see Emery, Copyright in Cinematographic Works - A Study of Comparative Law in Latin America, **Copyright 291 (September 1987).**

[47]. See, e.g., Articles 14-17; 63, as well the 1985 Law on Authors' Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises, Title II, articles 15-

Article 14 of the Copyright Law provides:

> Authorship of an audiovisual work shall be deemed to belong to the physical person or persons who brought about the intellectual creation thereof.
>
> In the absence of proof to the contrary, the co-authors of an audiovisual work made in collaboration are presumed to be:
>
> 1. The author of the script;
> 2. The author of the adaptation;
> 3. The author of the dialogue;
> 4. The author of the musical composition, with or without words, especially composed for the work;
> 5. The director (realisateur).
>
> When an audiovisual work is adapted from a pre-existing work or script which is still protected, the authors of the original work shall be assimilated to the authors of the new work.

Article 17 states that "[t]he producer of an audiovisual work shall be the natural or legal person who takes the initiative and responsibility for making the work." Article 63-1, tracks Article 14bis(2) of the Berne Convention, declaring:

> Contracts binding the producer and the authors of an

20, and, Decree No. 56-158 (1956); Registration of Contracts and Judgments Concerning Cinematographic Films.

> audiovisual work, other than the authors of a musical composition with or without words, imply, unless otherwise stipulated ... assignment to the producer of the exclusive exploitation rights in the audiovisual work.

The advantages of this presumption are, however, severely restricted by Article 31 of Title II, which requires that "[t]he transfer of authors' rights shall be subject to the condition that each of the rights transferred shall be specifically mentioned in the act of transfer." In reviewing these various provisions, one commentator concluded "[w]e must ... assume that this presumption of assignment is more philosophical (symbolizing the producer's privileged status) than truly legal." [48]

Federal Republic of Germany

The West German copyright law does not expressly state who is the author of a cinematographic work. In a comment submitted in this inquiry, scholars at the Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law, wrote that the majority view under West German copyright law considers as co-authors of the film authors of pre-existing works and those "who make[] contributions to the film, provided [the] contributions are distinguishable, independently exploitable creations, such as film exposes, treatments, screen plays and film

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48. Kerever, Audiovisual Works Under the French Law of July 3, 1985, **Copyright**, July-August 1987 at p. 247.

music." [49]

The West German Copyright Act adopts the presumption that authors of pre-existing works who have consented to adaptation of their works in motion pictures and authors of the film transfer exploitation rights to the producer. [50]

United Kingdom

Section 9(2)(a) of the 1988 U.K. Copyright, Designs and Patents Bill provides that in the case of a film the term "author" is to be regarded as "the person by whom the arrangements necessary for the making of the ... film are undertaken." [51] In practice, therefore, in the United Kingdom, the producer or studio is the author of the work.

The issue of authorship of motion pictures is principally significant in the United States only because of the directors' claims for a higher level of moral rights, an issue discussed in Chapter 5; however, since to some extent those claims are based upon a conception of authorship as encompassing only the principal director and screenwriter, we briefly address the issue here.

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49. Comment #2 at 8.

50. See Articles 88(1) & (5); 89(1); Statement of Max Planck Institute, Comment #2 at 8.

51. See also Article 11 which states a general rule that works made by employees in the course of their employment are first owned by the employer, subject to any agreement to the contrary.

The Directors' Position

The directors concede that the producer or other commissioning party should, in the absence of an individual contract to the contrary, have final say over the content of the work as it is first theatrically distributed.[52] They seek, however, to prohibit material alterations to the work after it has been so distributed, and seek to limit those who can object to such alterations to the principal director and screenwriter.[53]

The basis for this approach appears to be two-fold. First, the directors assert that all of the other creative participants place their trust in the director and that the director should, accordingly, be empowered to exercise rights on their behalf.[54] Second, the directors argue that aside from the principal screenwriter, these other creative

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52. See Directors Guild of America Basic Agreement at Section 7-206 ("Individual with Final Cutting Authority"); 7-505 (director's cut is presented to producer and other person designated as having final cutting authority); Statement of Directors Guild of America in Berne Convention Implementation Act of 1987, Hearings on H.R. 1623 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee, 100th Cong., 1st & 2d Sess. 421 (1987 and 1988)("House Berne Hearings"); and id., at 427 (testimony of Frank Pierson on behalf of the Writers Guild of America); Berne Convention, Hearings on S. 1301 and S.1971 Before the Subcommittee on Patents, Copyrights and Trademarks, Senate Judiciary Committee, 100th Cong., 2d Sess. 523 (1988)("1988 Senate Berne Hearings").

53. See H.R. 2400, 100th Cong., 1st Sess. (1988)(Gephardt "Film Integrity Act of 1987").

54. See testimony of George Lucas in 1988 Senate Berne Hearings, supra at 480.

participants "do not compose the yarn" and are "professionally subject to the disciplines imposed by the script and the director." [55] Under this approach, the other creative participants are not entitled to rights.

Opposition to the Directors' Position

These contentions have been disputed by producers and academics. In a statement submitted in this inquiry, Professor Peter Jaszi noted that developments in film criticism "have called the continued usefulness of the traditional concept of 'authorship' into question, at least as a way of understanding how works of creativity (including motion pictures) function to create meaning." [56] Professor Jaszi added:

> One important accomplishment of motion picture scholarship in the past two decades has been to emphasize the importance of the contributions of many different sorts of participants in the process of filmmaking. Clearly, several groups of filmmaking professionals, other than directors, have claims to be considered. Among others, the list would include art directors, cinematographers and film editors. [57]

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55. Response of Steven Spielberg to Questions Posed by Senator DeConcini, 1988 Senate Berne Hearings at 536.

56. Comment # 7 at p. 4.

57. Id. at 2.

Predictably, motion picture industry representatives have also disagreed with the directors' claims. In a written statement submitted to the Subcommittee for its June 21, 1988 hearing on H.R. 2400, Roger Mayer of the Turner Entertainment Company wrote:

> [W]e need to explore a minor myth: the contention that the old movies were exclusively the directors' vision, and thus the director has the right to control. There are a few exceptions but movie making -- even today -- is a hugely collaborative effort among many creators. Most of the black and white movies in question were made in the heyday of the studio system. Despite propaganda to the contrary, these old movies are not the immaculately conceived "children" of the directors. They are, for the most part, the "children" of the old movie moguls and their staff producers. Theirs was the "creative concept," and the financial responsibility. They chose the project, worked on the script with the writer, and then assigned all other jobs on the film, including the job of the director. As anyone familiar with the studio system knows, several writers or directors worked on many pictures, including such classics as "Gone With the Wind" and "The Wizard of Oz." The spiritual heirs of the moguls and producers, the true "parents" of these old films, are not the directors but the copyright holders -- who want to show off their children proudly to as large an audience as possible. Nobody has more of a stake in preventing the destruction of these pictures than the copyright holders. [58]

In his statement, David Brown, on behalf of the Motion Picture Association of America and his own production company, wrote:

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58. Statement at p.6. See also comments of Turner Broadcasting System, Inc. in this inquiry, Comment #4 at p.21.

> The American motion picture is a fusion of a variety of creative talents. It is a group collaboration. The worth and popularity of films depends on the skill of a legion of artists: the producers, directors, screenwriters, special effects artisans, actors, cinematographers, musicians, composers, lyricists, set designers, make-up artists, and others.
>
> Would Chariots of Fire have beguiled audiences if Vangelis had not created such a memorable score? Would Jaws have been so riveting and tension-packed without John Williams' thumping shark theme? Would the Exorcist have terrified and captivated audiences without the extraordinary make-up created for the young child? Would Star Wars have won such global applause without its astonishing special effects?
>
> The producer is no less a creative contributor than the director or screenwriter. Many of our most treasured motion pictures came to life because a producer had an idea and pursued it. [59]

CONCLUSIONS

We noted above the considerable difficulties faced over a period of decades in attempts to revise the Berne Convention to arrive at a satisfactory uniform treatment of authorship in cinematographic works, and how the ultimate result of those efforts has been described as being " 'devoid of practically any real substance.'" [60] In light of these

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[59]. Statement at 4.For references in the nonlegal literature discussing the nature of authorship of these other contributors, see e.g., Carringer The Making of Citizen Kane; Mordden, The Hollywood Studios: House Style in the Golden Age; Lourie, My Work in Film (autobiography of art director); Balshofer & Miller, One Reel A Week (cinematographers).

[60]. Ricketson at 582.

difficulties and the history of the film industry in the United States, efforts to define the authors of a cinematographic film will be problematic. In any event, since directors and writers do not seek to alter the rules for the exploitation of the first theatrically distributed version, the question is only faced in the context of moral rights, a question that adds even more complications, and which is discussed in Chapter 5.

CHAPTER 3: POST EXHIBITION ALTERATIONS TO MOTION PICTURES

If motion pictures were only viewed in theatres, Chairman Kastenmeier and Mr. Moorhead would not have requested this report, since directors have, for purposes of legislative reform, disavowed any desire to alter the traditional work made for hire relationship, according to which the producer retains the power to determine the "final cut," -- the power to determine the form in which the motion picture is first released for theatrical exhibition. [61] Instead, the directors' complaints concern only post-exhibition changes, changes that occur almost exclusively [62] in adapting the

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[61]. See DGA Basic Agreement Secs. 505 & 1502, and especially 1500 "[t]he Employer's decision in all business and creative matters shall be final;" **House Berne Hearings at 421, 427, 521; 1988 Senate Hearings at 523;** Oral Statement of Sydney Pollack prepared for the Subcommittee on Courts, Civil Liberties and the Administration of Justice, Sept. 30, 1987, reprinted in Comment #3 of this inquiry (directors have "no intention of upsetting the economic rights. The marketing, licensing, buying, selling, and theatrical exhibition of motion pictures rest solely with the proprietor. Our concern is subsequent to the time at which the film has begun to live in some form of exhibition, when it has acquired an identity," id. at p.5.).

[62]. Recently, the Library of Congress was the scene of an embarrassing and regrettable example of theatrical alteration. On July 29, 1988, before an audience that included the Librarian of Congress, the Register of Copyrights, Members of Congress, and diplomats, Soviet director Alexandr Askoldov complained bitterly that his long suppressed film "Commissar" was altered by the removal of certain opening shots, and by retitling. Additionally, publicity photographs were altered by removing Stars of David from the clothing of characters representing oppressed Jews.

As Mr. Askoldov informed the surprised and chagrined audience at the screening, these changes were made by the American distributor without his permission or knowledge. In commenting on these changes, Mr. Askoldov

theatrical film for the different technical requirements of the television screen.

The economic reason for adapting theatrical motion pictures for viewing on television screens -- whether via free broadcast, cable, or videocassette -- is obvious. The average cost of producing a feature film for a Motion Picture Association of America member is estimated to be over $20 million, up 113% from 1980. An additional $9 million is, on average, spent on advertising.[63] It has also been estimated that approximately two-thirds of MPAA member company films never recoup their costs.[64] Thus, "[o]nly through revenues from non-theatrical sources here and abroad, are MPAA members able to reduce their losses with respect to some films and recoup their costs as to others."[65]

While we cannot obtain exact figures, some estimates state that only 10 percent of a film's total audience views the work in the theatre: of the remaining 90 percent, 20 percent see it on videocassette or on cable television, while 70 percent view it on broadcast television, with the videocassette market growing in importance.[66] In 1986, for the first time, video rentals and sales surpassed proceeds from the box office. In 1988, box

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said: "I am absolutely appalled. What the Russian bureaucrats did not do to my film in the Soviet Union [the distributor] did in the United States." **Washington Post**, July 30, 1988 at p. C3.

[63]. Comment #5, Statement of Motion Picture Association of America at p.5.

[64]. Id. at p.6.

[65]. Id.

[66]. See Statement of Society for Cinema Studies, Comment #1 at 7.

office sales were $4,458,400,000. Videocassette rentals alone were $5,490,600,000. Videocassette sales added another $1,394,900,000. For obvious reasons, directors are not, to our knowledge, seeking to prohibit any distribution of their works in these media. [67]

Instead, the directors complain about certain forms of alterations made to their works in the process of converting them for viewing on television sets. However, colorization aside, the alterations complained of have been in existence for quite some time (as long as 25 years in some cases), and with little public complaint by directors. [68] In responding to this point during hearings in the Senate on May 12, 1987, the Directors Guild of America testified it had unsuccessfully attempted, through

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67. Distribution of motion pictures for free television broadcast may be declining. See testimony of Sydney Pollack in **House Berne Hearings** at 531 ("Most movies don't sell to television anymore and the few that do are the best movies."); testimony of Steven Spielberg in **1988 Senate Berne Hearings at 533**: "You don't see a lot of films on television any more. They don't work as well. They show them on HBO. They show movies on cassettes because people would rather see them without them being all chopped up." This may explain the apparent rise in the number of "made for television" movies. However, even these movies have been subsequently altered. See **New York Times**, January 22, 1989 at p.H27 (article by director Nicholas Meyer, complaining that his two hour and fifteen minute made for television movie "The Day After" was going to be broadcast the next night "with more than 23 minutes removed and 4 more minutes 'gained' through the use of compression.").

68. Individual directors have, of course, protested editing of their films for television. See Preminger v. Columbia Pictures Corp., 267 NYS2d 594 (Sup. Ct.), aff'd. 269 NYS2d 913 (App. Div.), aff'd mem., 273 NYS2d 80 (NY 1966); Stevens v. NBC, 148 USPQ 755; 150 USPQ 572 (Cal. Sup. Ct. 1966); 76 Cal. Rptr. 106 (Ct. App. 2d Div. 1969).

collective bargaining, to prohibit such alterations. [69] The DGA has, nevertheless, obtained certain contractual provisions concerning editing for television. [70] And, certain individual directors have obtained considerable control over both the original theatrical form of the film and post-theatrical release alterations.

The issue of whether collective and individual bargaining should be relied upon in lieu of legislation is complex and is addressed below in Chapter 4. However, in order to understand the nature and efficacy of such bargaining, we need a basic understanding of the technologies involved and how they affect the aesthetics of filmmaking and the habits and preferences of viewers.

Adoption of broadcast standards for television

Just as theatrical screens and television monitors come in different sizes, methods for projecting the images displayed vary as well. The Academy of Motion Pictures projection standard is 1.85:1, meaning that the projected image is 1.85 times as wide as it is high. This relationship between width and height is called the "aspect ratio." In an effort to create panoramic

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69. See Legal Issues that Arise When Color is Added to Films Originally Produced, Sold, and Distributed in Black and White, **Hearing Before the Subcommittee on Technology & The Law, Senate Judiciary Committee, 100th Cong., 1st Sess.** 14 (testimony of Elliot Silverstein); 44 (testimony of Woody Allen)(1987) ("Senate Colorization Hearing").

70. See id. at 15 and DGA Basic Agreement Sec. 7-509 and 7-513 (right of consultation for "coloring, time compression and expansion, changes in the exhibition of the aspect ratio (e.g. 'panning and scanning.')."

effects and lure audiences away from television, processes that permitted even wider screen images were developed in the 1950s. Among the better known of these processes are CinemaScope and PanaVision, which have aspect ratios of 2.35:1.

The net aesthetic result of these higher "'Scope" aspect ratios has been called into question by one prominent critic:

> The compression of the wide image onto the film and its subsequent expansion in the projector made the photography grainy, especially in black and white, which was henceforth virtually abandoned... The new shape was impossible to compose for... . Editing was cut to a minimum because on an image so large each cut made the audience jump. Instead, and cheaper, the camera stayed still while the cast roved around the empty spaces in front of it, and there was an absurd number of shots in which the leading actors reclined so as to better fit the frame. Close-ups and subtle nuances were forgotten: no longer did the camera direct the drama, you had to look around and find it yourself... .
>
> In many cinemas CinemaScope was even a fraud, for it had to be on a screen smaller in area than the old image, which was now being referred to sneeringly as 'postage stamp.' This happened when the old screen had already occupied all the width allowed by the cinema's structure: to get the CinemaScope shape, if you could not go any wider, height had to be sacrificed, and audiences wondered why suddenly they were looking at a ribbon of picture across the middle of the space which the old screen had occupied. [71]

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[71] Halliwell, **Halliwell's Film Guide** 1002 (2d ed. 1979). See also Transcript of the Copyright Office September 8, 1988 hearing at 13.

Even Halliwell admits, though, that directors enjoyed composing for 'Scope. [72] It is, though, ironic that in the late 1950s and early 1960s, the motion picture companies began selling these films for viewing on television in order to recoup the increased costs of production. [73]

This increased economic dependence on the television market led the motion picture companies to develop "pan and scan" systems that would avoid severe problems that inevitably result in unaltered transmission of 'Scope films on television. The source of the problem is found in the smaller aspect ratio used in television, a ratio that is the result of a decision made in the 1940s by the engineering community in setting the broadcast standards for television. The National Television System Committee standard agreed upon is an aspect ratio of 1.33:1.

Accordingly, if a theatrical motion picture shot in a larger aspect ratio is to be viewed on a television screen, [74] the motion picture aspect ratio must be reconciled with the (smaller) aspect ratio of the television

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72. A number of current directors would also like to compose in 'Scope but are faced with a dilemma. If they do so, they must either forego the extremely important television market, or see their films significantly altered for adaptation for television. See Belton, **The Shape of Money**, 57 **SIGHT & SOUND 45, 46 (Winter 1987)**, reprinted in Comment #1 (quoting director Martin Scorsese as wanting to shoot all his films in 'Scope, "but I realize that when it's shown on TV the power of the picture will be completely lost."). This reluctance to shoot in 'Scope has resulted in a tacit acceptance of the 1.85:1 aspect ratio.

73. The trend toward integration in the entertainment industry has created a situation where cable systems are assisting in the financing of theatrical motion pictures, which are then shot with the cable market in mind. See statement of Society for Cinema Studies, Comment #1 at 11.

74. Since it is the projected aspect ratio of the television screen that matters, the need for adaptation is the same for cable and videocassettes as for broadcast television.

screen. There are two principal ways of doing this: "letterboxing" and "panning/scanning."

Letterboxing

Letterboxing is the technique favored by a number of directors, including Woody Allen, who used it in adapting his film "Manhattan" for non-theatrical distribution. In addition, letterboxed versions of "Hidden Fortress," "The Graduate," "Blade Runner," [75], "New York, New York," "Ferris Bueller's Day Off," among others are available on videocassette.

With letterboxing, the theatrical aspect ratio is retained, but the picture is shrunk, resulting in the image being "boxed in" by dark bands above and below. The aesthetic effect of letterboxing is subject to some dispute. For directors and cinematographers, letterboxing affords the opportunity of keeping the film's theatrical composition intact. However, the image is smaller, a result that has adverse effects on small screen televisions, leading some critics to contend that "you end up seeing less."[76] The reduced image is less a problem on large screens. Broadcasters oppose letterboxing based on a belief that it is "unattractive to viewers." [77] For

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[75]. A demonstration of the letterboxing of this film was given at the Copyright Office's September 8, 1988 hearing.

[76]. See Belton, **The Shape of Money**, supra at 46-47.

[77]. See Comment #15, statement of National Broadcasting Company at p.2.

the same reason, many of the motion picture companies [78] and the video retailers [79] oppose letterboxing.

George Stevens, Jr. of the American Film Institute, however, submitted a statement in this inquiry in which he asserted "[a]udiences will, particularly as the resolution of television sets improve, quickly adjust to the dark spaces at the top and bottom of the screen and appreciate the preferred experience of seeing scenes as they were composed by the director and his cameraman." [80]

From demonstrations of letterboxing given at our September 8, 1988 hearing, certain aesthetic advantages are apparent. These advantages must be weighed, though, against the tendency of some consumers to object to the presence of dark bands on the screen. The various benefits of letterboxing can, perhaps, best be understood by contrasting the technique with its alternative: panning and scanning. [81]

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78. See Comment # 5, statement of the Motion Picture Association of America at Tab C, p. 2: "Panning and scanning is generally the option of choice. Consumers prefer an image that fills the entire screen over the 'wide and short' image, with broad black top and bottom borders, that appear on a 'letterboxed' image."

79. See testimony of Vans Stevenson of Erol's Inc. at Copyright Office Sept. 8, 1988 Hearing, Transcript at 248-249 (although Erol's has not had negative reaction to the few films letterboxed, a belief was stated that letterboxing "would have a tremendously adverse impact on our business, because ..., when people watch television, they are used to watching it full frame... .").

80. Comment #14 at p.6.

81. The introduction of High-Definition Television (HDTV) may make letterboxing a more attractive alternative to panning and scanning. HDTV will bring vastly superior contrast and larger screens. Additionally, the expected use of a larger aspect ratio than the 1.33:1 currently used in television will result in less of the image being cropped.

Panning and Scanning

"Panning and scanning" was introduced in approximately 1961 as a result of network television's refusal to show the equivalent of letterboxed films, based on a belief that viewers prefer a picture that fills the entire television screen. The goal of panning and scanning is "to try and preserve what the director did with the original film and to try and make it look best." [82] At its simplest, panning and scanning involves a process "whereby the widescreen image is successively recomposed by a camera which scans the width of the image possessing full height but missing the sides (which have been chopped off)." [83] The "rule of thumb for panners and scanners is to follow the action, which simply translates into holding on whoever is speaking or following the movements of the central character." [84]

A technical and somewhat more optimistic description of panning and scanning is provided in the following comments of the Motion Picture Association of America:

> [First] [f]ilm-to-tape transfer is undertaken on a "telecine machine," manufactured by such companies as Rank Cintel, Bosch Fernseh and Marconi. A reel of film is threaded through an apparatus that looks like a film projector and onto a take-up reel. A

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82. Statement of Ralph Martin, supervisor of panning and scanning for Warner Bros., quoted in Belton, **Shape of Money**, supra, at p.45.

83. Comment #1, statement of Society for Cinema Studies at 6.

84. Id. at 20-21.

cathode ray tube (CRT) is used as a light source, and projects through the passing film frames. The focal point of the light source which moves across the film frame is called the "raster." The "projected" image then passes through a series of mirrors which divide the picture into red, green and blue components. These color components are picked up by photoelectric cells which transform the photographic image into electronic information, which is then manipulated through computer-controlled electronics.

The "telecine operator" (also known in the trade as a "colorist") sits before a sophisticated bank of electronic equipment. The operator views the image fed from the telecine machine on a high-quality video monitor. In order to determine how the picture should be panned-and-scanned, the telecine operator moves the "raster" across the film image, deciding which portions of each frame should be transferred to video.

In layman's terms, it is possible to think of the moving "raster" as a "camera" that is moved around the film image to capture and accentuate those parts of the image that will be most effective in the video version of the film. The increased sophistication of computer electronics now permits the telecine operator to make both linear and non-linear moves across the film image. Thus, the telecine operator can vary the speed with which the "camera" pans across the image, and can raise and lower the image in virtually any direction. Moreover, by using a device called an "x-y zoom," the telecine operator can zero in on specific features on the film image and accentuate them in the video version. [85]

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[85]. Comment #5 at Tab C pp. 3-4.

Early panning and scanning sometimes involved single, fixed position scanning whereby the center portion of the original image was merely rephotographed, a "technique" that occasionally led to bizarre recomposed scenes. For example, in a commercial airliner cockpit scene in "The High and The Mighty," John Wayne and Robert Stack are having a conversation, but in the panned and scanned version one cannot see them, only a view of the instrument panel and the cockpit console between them. [86]

Improvements in panning and scanning were made in the 1960s, with the introduction of telecine devices, which permitted up to twelve different positions for rephotographing the original image. One foe of panning and scanning concedes that "[t]oday, there are virtually an infinite number of possible positions as well as new technologies which make optically introduced panning movements virtually indistinguishable from actual camera pans." [87]

The aesthetic effect of panning and scanning will ultimately depend upon the degree to which the aspect ratios have to be reconciled and the original shots recomposed, as well as the skill of the telecine operator, the care with which the panning and scanning is done, and the amount of time the operator is given to complete the job. However, even the best telecine operator cannot compensate for the loss of the visual impact of a wide screen exhibition of motion pictures shot in 'Scope.

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[86]. See generally, Belton, Pan and Scan Scandals, 3 **The Perfect Vision 40 (1987)**, and testimony of Rob Word at Copyright Office September 8, 1988 hearing, Transcript at 13-14 (tieing problem, in part, to widescreen composition).

[87]. Belton, **The Shape of Money**, supra at 45.

Some motion picture companies perform panning and scanning in-house, while others contract it out. Under the Directors Guild of America Basic Agreement, directors have a right to be consulted about and to be present during the panning and scanning process. [88]

The right of consultation is not, of course, the same as the right to prohibit panning and scanning, nor even to have the final say over how a film is panned and scanned. Perhaps in light of these limited rights (and in order to retain the financial benefit of exploitation on television), directors and cinematographers have attempted to minimize the negative effects of panning and scanning by shooting the original theatrical version of the film in an aspect ratio roughly equivalent to that of television. This method of composing began in the early 1960s, when the American Society of Cinematographers issued a series of recommendations to its members

> advising them to compose their widescreen images for television's "safe action area." Camera manufacturers began to produce viewfinders which indicate this area with a dotted line, and cinematographers began to protect their compositions for television by keeping essential narrative and/or aesthetic elements within this frame-within-a-frame. By keeping all crucial story information within the safe action area, cameramen adapted their art to satisfy the demands of the television screen and the needs of panning and scanning. The extreme widescreen compositions of the 1950s which exploited the full width of the frame and often placed figures at either edge of it gave way to conservative compositions characterized by "dead" space on either side of the central area of interest in the frame... . In effect, the threat of panning and scanning for television has taken its

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88. See DGA Basic Agreement at Sec.7-513.

toll on widescreen aesthetics. [89]

Since many directors and cinematographers have, for over a quarter of a century, been shooting within the "safe action area" in order to both preserve, as much as possible, the integrity of their composition and not foreclose the profitable television market, they have somewhat weakened their claim that legislation is required to permit them to prohibit panning and scanning. [90] Notwithstanding the sometimes regrettable effects of poor panning and scanning, adequate technical and marketplace solutions to the problem appear to exist.

Lexiconning

Cable services such as HBO and Showtime, as well as videocassettes and videodiscs are generally not subject to time limitations, and thus, "it is rarely necessary to modify [the] running time of a film for these media."[91] This is not the case for television broadcasts and airlines. "Airlines must

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89. Comment #1, Society for Cinema Studies at 9-10.

90. Importantly, in 1960 the DGA, Writers Guild of America, Screen Actors Guild, and the American Federation of Musicians signed collective bargaining agreements with the producers waiving the guilds' rights to revenues for free television broadcasts of theatrical motion pictures made before 1960, in exchange for a cash settlement to be applied for pension plans established under the agreements. For theatrical motion pictures made since 1960 and broadcast on free television, the guilds divide up a total of 12 1/2 of the gross revenues from those pictures in the following proportions: 1.2% each for the DGA and WGA, 3.6% for the SAG, 1% for the AFM, and 5.4% for the International Alliance of Theatrical and Stage Employees.

91. Comment #5, statement of Motion Picture Association of America at 4.

show motion pictures that fit conveniently into the travel time not allocated for meal and beverage service and other amenities," while "[t]elevision broadcasters need motion pictures that will fit into designated time slots (usually measured in 30-minute increments) with time allotted for the carriage of commercial announcements." [92]

A "lexicon" machine -- which either compresses or expands the running time of a film -- alters the motion picture in order to fit it into a specific time slot. Technically, lexiconning may be described as follows:

> Compression or expansion are accomplished by changing the rate at which the film frame runs past the "raster." Today's telecine equipment permits speed changes that are measured in hundredths of a frame per second, permitting precise changes in timing of the motion picture. Compression and expansion are accomplished so that no change is discernible to the naked eye.
>
> By ascertaining the running time needed for the video version of a feature film and applying a mathematical formula, the telecine operator can determine whether an entire motion picture or selected portions should be expanded or compressed. Motion pictures can be compressed or expanded by up to 6 or 7 percent with no effect on the viewer perception of the work, although a 2 to 3 percent change in speed would be the average. Time-base correction devices are used to interpolate picture information, thereby avoiding "jerking" or other defects in the video image.
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> A 1-to-2 percent change in the speed of the film has no noticeable effect in the pitch of the audio. If the speed change is greater, it becomes necessary to adjust the pitch of the sound to eliminate the "chipmunk effect" or "slo-mo effect." This is accomplished by running the sound levels through an

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92. Id.

> audio pitch changer (manufactured by companies such as Lexicon or Eventime) which makes the necessary adjustments automatically when it is instructed what the original film rate is (in frames per second) and what the new film rate is. [93]

Lexiconning is generally performed by independent television stations, although some film packaging firms may supply already lexiconned films to these stations.

The Effects of Lexiconning on the Aesthetics of Theatrical Motion Pictures

The adverse effects of lexiconning are best appreciated when time is compressed. One particular example from "Casablanca," was shown at the Copyright Office's September 8th hearing. Based on this and other examples, we conclude lexiconning can adversely affect the director's, cinematographer's, editor's, and actors'/actresses's contributions. And, unlike panning/scanning, there is nothing these individuals can do during the shooting of the theatrical version of the film to protect it from such subsequent alteration. Section 7-513 of the DGA Basic Agreement gives directors the right to be consulted about lexiconning; however, given that lexiconning generally takes place at independent stations, it is hard to see how this consultation could effectively take place.

Little information was provided about the extent of lexiconning, and

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93. Comment #5, statement of Motion Picture Association of America, Tab C at 5.

outside of a few egregious examples, not much is known about how often lexiconning results in noticeably adverse effects. For films that do not fit within the regular broadcast time slots, some adjustment must be made either in the work itself or in the manner in which motion pictures are scheduled for broadcast.

Computer Color Encoding

In our prior proceeding to determine whether to register claims to computer color encoded versions of black and white motion pictures, we received considerable technical commentary on the "colorization" process. [94] In connection with this proceeding, Copyright Office staff spent a day each at Colorization, Inc. and Color Systems Technologies studying, in-depth, how their respective processes work. Because the encoding companies each use different processes, no single description of computer color encoding can be accurate.[95] Accordingly, the following description is, of necessity, general.

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[94]. See comments submitted in connection with Registration of Claims to Copyright Notice of Inquiry: Colorization of Motion Pictures, Docket RM 86-1. We solicited and received additional descriptions in connection with this report. See Comment #3 (Color Systems Technology) and Comment #4 (Turner Broadcasting Systems).

[95]. A good discussion of the three principal processes is found in IEEE Spectrum, August 1987, reproduced in Comment #18 (American Film Technologies). See also Comment #3 (Color Systems Technology), Exhibits E&F.

The process begins with a decision by a commissioning party [96] to "colorize" a particular motion picture for which it either owns the copyright, or which is in the public domain, e.g., It's a Wonderful Life. Either the commissioning party or the encoding company obtains the best quality (black and white) print of the work, which is first cleaned up by removing defacing marks and scratches and then copied intact onto a videotape. [97] Black and white video signal information on the videotape is digitized and entered into a computer. Software divides the black and white video frame into a grid consisting of 1,024 horizontal and 512 vertical pixels and then establishes the luminance (brightness) and chrominance (color) values for each such pixel. [98]

Next, the black and white videotape is viewed in its entirety by an art director. The film is then categorized into individual scenes in which the basic visual elements are constant. The scenes are numbered chronologically and described in detail, including the type of movement and the presence of special effects. A reference file with specific information about and descriptions of each character is made, along with layouts of the

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96. Most computer color encoding is done by an encoding company on behalf of a client, although this is not the case for Quintex, which has its encoding done by an affiliated company, Colorization Inc. Color Systems Technology also owns rights to some films which it will color.

97. Encoding companies have emphasized that the original print is left untouched by this process.

98. A television signal is comprised of four signals: (1) a chrominance signal, which generates red, green, and blue; (2) a luminance signal, which controls brightness and intensity; (3) vertical blanking interval signals; and, (4) horizontal blanking signals.

sets. [99] For each scene, research is conducted regarding historical information (uniforms, flags, etc.), and publicity photographs or other information about the original cinematography is gathered. Typically, this information fills in a very small proportion of the color selection process. The vast majority of color selection is based on the art director's (and client's) interpretation of the script, the personality of the characters, and the overall mood of the picture. Once these decisions are made, the scenes are broken down into a number of key frames. A key frame typically "include[s] the first frame of a scene, and usually several succeeding frames that require a change or introduction of color, because a change in lighting casts a different tone on all colors." [100] Each key frame is "handpainted;" i.e., the color is determined in its entirety by the art director. This color information is then stored in the computer, which proceeds to automatically encode the color from the key frame to subsequent frames until the next key frame occurs, whereupon the process is repeated until the film has been completely encoded.

After completion of the initial encoding, the art director reviews each frame in the equivalent of a cutting room in order to make necessary adjustments in color and to hand paint objects which did not appear in the key frames. The frames are then organized in the proper sequence and transferred onto a master tape. The entire process takes approximately one

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[99]. Colorization Inc. actually creates a "storyboard," a comprehensive series of three ring binders containing details of all the scenes in the film. One such storyboard, for a Laurel and Hardy short, and provided to us for this study, filled six three ring binders.

[100]. IEEE Spectrum, August 1987 at 51.

month, with an average cost of $3,000 per minute, or $300,000 for a 100 minute motion picture.

The oldest of the encoding companies is Colorization Inc., of Toronto, Canada, formed in 1981 and affiliated with Quintex Corporation, which owns a substantial portion of its financial stock. Colorization's first release -- a color-encoded version of Laurel and Hardy's The Music Box -- was broadcast in 1983. Its first full length colorized motion picture was Topper, released in 1985. Colorization Inc. has recently decided to focus almost exclusively on encoding black and white television series.

Color Systems Technology of Marina Del Ray, California was founded in 1983 and has color encoded a number of films for 20th Century Fox and Turner Entertainment (out of its MGM, Warner Bros., and RKO libraries). It recently signed a contract with French director Jean-Luc Godard to color encode his film Breathless.

Tintoretto, Inc. of Toronto was formed in 1986 by former employees of Colorization Inc. and uses a process similar to Colorization Inc.

Founded in 1987, American Film Technologies, of San Diego, California, is the most recent color encoding company. It has encoded a number of films for Turner Entertainment Company and others.

To date, fewer than one hundred black and white films have been color encoded. [101] Color encoding has also been used with television programs, newsreels, and cartoons. It is used almost exclusively for videocassettes, and for cable and television broadcasts. Technically, colorized video tapes

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[101] See Comment #4, statement of Turner Broadcasting System, Exhibit A, for a partial list of these films.

may be transferred to a print format and exhibited in theatres. However, as one comment letter noted:

> This is more of a function of the commercial marketplace rather than one of technology. The relative growth of home video, television, and pay cable distribution versus that of theatrical distribution, has led to this practice. Moreover, theatrical distribution, in most cases, is commercially viable only for entirely new mass appeal movies, and not for derivative works based on the classic motion pictures. [102]

The underlying rationale for computer color encoding black and white motion pictures is not complex: to increase the number of people who view the pictures and to make a profit by doing so. Judged by these standards, colorization has been successful.[103] The effect of computer color encoding on the aesthetics of motion pictures, is of course, a separate issue, and one we will now address.

Effect of Colorization on the Aesthetics of Black and White Motion Pictures

Unquestionably, "colorizing" a black and white motion picture changes

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102. Comment of Hal Roach Studios, Inc., in Copyright Office Docket No. 86-1, at p.17.

103. See Comment #4, Turner Broadcasting System at 7-19; Comment #3, Color Systems Technology at 4-6; 12-13; 23-25.

that picture's aesthetics. [104] Indeed, the basis for the Copyright Office's June 12, 1987 Registration Decision was the Office's finding that computer encoded colorization represents new authorship apart from that found in the underlying black and white film. It is not, therefore, a subjective judgment about computer colorizing to describe the process as "adversely affecting"

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104. See statement of New York Times film critic Vincent Canby, submitted to the Subcommittee for its June 21, 1988 hearing on H.R. 2400, at pp.1-2:

> Black-and- white films are made according to their own aesthetics. Some things can be done in color photography that cannot be done in black-and-white. Black-and-white offers opportunities to the film maker not available in color. Because of this, we respond to black-and-white films in one way, and to color films in another. Black-and-white films are neither better nor worse than color. They are a different aspect of cinema art.

See also **Senate Colorization Hearings** at 11 (testimony of Elliot Silverstein: "Black and white photography is not color photography with the color removed. It involves a completely different technique... ."); 18 (testimony of Sydney Pollack); 47 (taped testimony of John Huston) ; and 55 (testimony of Woody Allen).

On November 23, 1988, the First Chamber of the Grand Instance of Paris, France upheld a moral rights claim asserted by director John Huston's heirs against the proposed broadcast of a colorized version of the director's film "The Asphalt Jungle," based on the videotape made by Mr. Huston for the 1987 Senate Colorization Hearings.

In a statement submitted in connection with this report, scholars at the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, concluded that under West German law, colorization would, absent consent, violate the moral rights of those who contributed to the creation of a black and white motion picture. Comment #2 at pp. 11-12.

In 1964, an Italian appeals court is reported to have issued an injunction a publisher restraining it from distributing copies of a book with drawings by artist Ben Shahn that had been created in black and white but colored without his approval.

the aesthetics of the black and white film it is based upon. It is only to state that the original aesthetic has been replaced. Nor, hyperbole aside, is the issue the quality [105] of the encoding. Rather, given that colorization undeniably alters the aesthetics of the black and white work, the issue is whether should Congress upset the existing legal and economic regime under which owners and licensees of copyright have the right to colorize, by granting directors and other new moral rights, a question we cover in Chapter 5, below.

Future Technologies

The Copyright Office has received information about two future technologies that may affect the aesthetics of motion pictures shown on television. The first of these is High-Definition Television (HDTV).[106] When finally introduced, HDTV will provide a television picture with sharply improved color and clarity. This sharper picture is the result of a more than doubling in the number of lines per frame currently used (525) and the use of the latest digital processing techniques. The Federal Communication Commission has not yet adopted an aspect ratio for HDTV, although most

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105. See **Senate Colorization Hearings** at 17, testimony of director Sydney Pollack: "You have seen a demonstration of the new technology that is quite good and, like all technologies, is going to get better. But the fundamental issue is not how good it is. ...[It is] that it is not in any sense the same as black and white... ."

106. See generally, statements and testimony submitted to the House Subcommittee on Telecommunications and Finance in connection with its March 8 and 9, 1989 hearings on HDTV.

proposals are for aspect ratios higher than the current 1.33:1 ratio currently used on standard television sets. Thus, HDTV could further reduce the need for panning and scanning.

Congress and the Copyright Office also received evidence on computer generation of life-like representations of people, through which "[w]e may be able to recreate stars of the past, Clark Gable and Rita Hayworth, cast them in new roles, bring them forward into time in new settings...." [107]

We have seen a demonstration of this technology, which appears to be in its infancy. We do not, therefore, see any urgent need to study issues raised by computer generation of individuals in this report.

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107. Senate Colorization Hearings at 46.

CHAPTER 4: THE IMPACT OF COLLECTIVE AND INDIVIDUAL BARGAINING ON THE DEVELOPMENT AND DISTRIBUTION OF MOTION PICTURES

We noted in the last chapter that only an estimated 10 percent or so of a theatrical motion picture's total audience comes from theatrical exhibition; the remaining 90 percent is comprised of videocassette and cable (20 percent) and free broadcast television (70 percent) distribution. We also noted that roughly two-thirds of all MPAA member company films do not recoup their costs. Given these statistics, it is hardly surprising that virtually all theatrical motion pictures are made with the understanding that they will subsequently be viewed on television screens. We further noted that the different technical requirements of television viewing will, at least under industry preferred approaches, lead to certain alterations in motion pictures for these post-theatrical markets.

In this chapter, we examine how collective and individual bargaining in the motion picture industry affects the development and distribution of motion pictures.

Copyright Ownership and Preparation of the Motion Pictures for Exhibition

Perhaps more than any other form of authorship, motion pictures are the result of collaborative effort and a great deal of money. Those who participate in the film's creation generally all share in the twin

objectives of artistic and financial success. The manner and amount in which directors, screenwriters, actors, and others are compensated varies considerably, and is outside the scope of this study. [108] Compensation aside, all of these creative participants will be typically employed under work made for hire arrangements or transfer of rights agreements, under which the employer -- be that a producer, studio, or financing corporation [109] -- is considered the author and copyright owner.

The extent to which the producer may exercise these rights is, however, circumscribed by a number of factors, the most important of which are: (1) the economics of the motion picture industry, which require post-

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[108]. The two principal methods of compensation are payment of a flat fee under a service contract, and net profit participation. See generally, Squire, **The Movie Business Book** (1983); Rudell, **Behind the Scenes: Practical Entertainment Law** (1984); Vogel, **Entertainment Industry Economics: A Guide for Financial Analysis** (1986).

[109]. For simplicity's sake, we will refer to this individual or corporation as the "producer" since most of the testimony in the recent congressional hearings was couched in director versus producer terms. A "producer" will, we understand, most often be a company, perhaps established solely or principally for purposes of producing motion pictures and television programs.

Whether the producer, studio, or financial corporation backing the picture owns the copyright is generally dependent upon how large a role the producer plays in bringing the various elements together, and how much financial risk he or she takes. If, for example, the producer packages a deal and then signs a contract with a studio under which the studio bears the ultimate responsibility for completion of the picture, it is expected the studio will usually own the copyright. If, however, the producer obtains independent financing, hires the director, screenwriter, actors, and clears rights, he or she may own the copyright. For purposes of this report, the significant point is that the copyright is typically owned under a work made for hire agreement by someone other than the director. See **1988 Senate Berne Hearings** at 408, 438-440, 519. Of course, on occasion, directors have also generally assumed the role of producer, in which case they are also the copyright owner.

theatrical marketing of films on cable, videocassettes, and free television; and, (2), the guild [110] and individual creative artists' agreements.

Directors Guild of America's Basic Agreement

Section 7 of the Directors Guild of America's (DGA) Basic Agreement [111] contains a detailed set of minimum conditions for the preparation, production, and post-production stages of motion pictures, as well as for post-theatrical release editing. Under Section 7-101 of the Basic Agreement, the director "participat[es] in all creative phases of the film-making process, including but not limited to all creative aspects of sound and picture;" "[t]he Director's function is to contribute to all of the creative elements of a film and to participate in molding and integrating them into one cohesive dramatic and aesthetic whole."

After the director completes shooting of the principal photography, he or she is responsible for the presentation to the producer (or representative thereof) of his or her cut of the film, known as the "Director's Cut." Sections 7-501, 505. This responsibility is described as an "absolute right," Section 7-508, and "[n]o one shall be allowed to interfere with the Director of the film during the period of the Director's

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110. The principal guilds and unions are the Directors Guild of America (DGA), Writers Guild of America (WGA), Screen Actors Guild (SAG), International Alliance of Theatrical and Stage Employees (IATSE), and the American Federation of Musicians (AFM).

111. The Basic Agreement is negotiated with the Alliance of Motion Picture and Television Producers (AMPTP), which represents a variety of producers of motion pictures and television programs. See Comment #5, Statement of Motion Picture Association of America, Tab B at n.2. Many non-AMPTP members are also signatories to the Basic Agreement. It is estimated that upwards of 90% of the production companies in the United States are signatories to the Agreement. Id. at p.2. Approximately 95% of the directors of motion pictures produced in the United States are represented by the DGA. Id.

Cut." Section 7-504.

Following presentation of the Director's Cut, the producer, in collaboration with the director, [112], prepares the "Final Cut." While the Final Cut may be identical to the director's version, it may not be: the decision is the producer's. One example of the give and take that occurs at this stage was given by director Sydney Pollack before the Subcommittee at its September 30, 1987 hearings on the Berne Convention:

> [A] studio might say, we can only run a certain number of showings per day. This is an economic decision. If the movie is under two hours, and we have 10 minutes to turn an audience around, we can get in an extra show.
>
> If you make this movie 2 hours and 10 minutes, we can't get that extra show in. It is now my job [as director] to try as hard as I can to make it to their time limit.
>
> Here is what does happen sometimes. Sometimes you go to them and you say, look, guys, it is now 2 hours and 10 minutes. You look at it. If you agree that I can get it down to no less than that, I will cut it.
>
> The studio will look at it - forgive me for being personal - I signed a contract on "Out of Africa" that said I would deliver a 2 hour and 15 minute movie. That movie went out at 2 hours and 41 minutes so I violated that contract by half an hour.
>
> When I got the movie to 2 hours and 41 minutes, I called the studio and said, I am going to show you the movie. I owe you a cut of 2 hours and 15 minutes. Here is what I have so far; I am a little bit stuck here. They looked at the movie and said, do the best you can do. If you can't get it any shorter, you can't.

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[112]. DGA Basic Agreement, Section 7-506.

> They would have been totally within their rights, to make me cut it, and I wouldn't have argued with them - it was their $30 million. I am not going to tell them what length they have to release the movie at.[113]

Following agreement upon and release of the "Final Cut" version of the film for theatrical exhibition, the post exhibition release editing begins. Editing may be required for foreign exhibition (e.g., dubbing, compliance with censorship laws), and, of course, for domestic viewing on cable, videocassettes, and later, airlines, and television broadcast. Sections 7-509 through 7-513 of the DGA Basic Agreement have a number of provisions giving directors the right to be present while editing is accomplished. Of particular relevance is Section 7-513:

> The Employer shall consult with the Director with respect to coloring, time compression and expansion, changes in the exhibition of the aspect ratio (e.g. "panning and scanning") and changes to allow exhibition in three dimensions made to a theatrical motion picture after delivery of the answer print. The Director's services in connection with such consultation shall be provided at no cost to the network or Employer or distributor.

Section 7-509 recognizes the director's role in preserving the basic integrity of the motion picture as theatrically released by affording the

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113. **House Berne Hearings** at 528. In some instances, however, directors, in their individual contracts, have been able to obtain "final cut" authority, and to prohibit post-theatrical alteration to the work. See **1988 Senate Berne Hearings** at 366; 529; 532; **Senate Colorization Hearings** at 44.

director the first opportunity to edit the film in non-theatrical markets, including network television (Section 7-509(b)); syndication (Section 7-509(d));[114] and, domestic home video (Section 7-509(g)). Additionally, the director has the right to do the shooting if new footage is added to the theatrical version (Section 7-509(e)).

These provisions were the result of protracted negotiations. As director Elliot Silverstein testified in 1988 Senate hearings on U.S. adherence to the Berne Convention:

> [I]n the last negotiation the specific areas that we are discussing here were proposed at the bargaining table. What we did gain was the right to consult on all of these things, and we said to the CEO's of the companies who face us: "That is not good enough. The consultation doesn't mean anything because if we disagree, we lose." The answer came back, "That's right. If we disagree, you lose," so that this is a pro forma consideration. This is not a moral right. It is a right of consultation.[115]

This testimony was disputed by Roger Mayer of the Turner Entertainment Company at the Copyright Office's September 9, 1988 hearing: "When somebody says you can consult, that is not an idle thing. That involves time. It involves money. I think it is a concession, and I think it

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114. But cf. **Senate Colorization Hearings** at 14-15 for testimony by the directors noting difficulties in enforcing certain of these provisions.

115. **1988 Senate Berne Hearings** at 533. See also draft proposals reproduced in Comment #3, statement of Color Systems Technology, Exhibit BB; **House Berne Hearings** at 519.

is something they earned." [116]

A fair question to ask then is: Why does the DGA's failure to obtain the desired rights through the collective bargaining process necessarily indicate a breakdown in that system, and particularly one that requires federal legislation to repair? [117] In any labor setting, the parties arrange their priorities, including those they are willing to strike over and those they are willing to trade off to obtain other benefits without having to strike. [118]

Certainly, the directors receive substantial compensation in exchange for granting their employers broad rights to exploit their films. [119] Moreover, labor relations in the motion picture industry have a long history and do not present a situation where the economic leverage of the employers dwarfs that of the employees. Additionally, the DGA Basic Agreement

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116. Transcript at 84. See also Comment #5, statement of Motion Picture Association of America, Tab C at 5-6, and id. at 6 (noting establishment of a "creative rights" standing committee, requested by the directors, composed of an equal number of directors and producers, to provide a forum for discussing creative rights issues). It is reported that Blake Edwards' film "That's Life," scheduled to broadcast on CBS on January 30, 1989 was pulled when Edwards complained that Columbia Pictures, the films' distributor, failed to consult Edwards about editing the work. See DAILY VARIETY, February 22, 1989, p.2.

117. See questioning of director Sydney Pollack by Chairman Kastenmeier in House Berne Hearings at 519.

118. See comments by Representative Berman at the Subcommittee's June 21, 1988 hearing on H.R. 2400, unofficial transcript at 87-88.

119. See statement of Roger Mayer, Turner Entertainment Company, submitted to the Subcommittee for its June 21, 1988 hearing on H.R.2400, at pp.6-7.

represents only minimum rights; individual directors have negotiated above these requirements, [120] although the number who are able to gain substantial control over the final product and its post theatrical exhibition form is estimated to be only 5 percent.[121] If one can not bargain for the desired rights, the option still exists for the director to seek independent financing of his or her film, a task which may be difficult, but which is certainly not impossible. For European directors, that practice is standard.

One rebuttal to reliance on collective or individual bargaining was given by director Arthur Hiller before the Subcommittee at its June 21, 1988 hearings on H.R. 2400:

> What we are talking about is a social issue, and that is the preservation of an art form. And that talks about our society as it is today and the society of the future, and I think that is beyond collective bargaining. [122]

A second reason given by directors for not relying on collective or individual bargaining is based on alleged restrictions in the labor laws regarding subjects of bargaining. This issue was raised by director Sydney

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120. Of particular interest in this respect is the Turner Entertainment Company's February 14, 1989 announcement that it would not colorize Citizen Kane because of concern that the contract between RKO Pictures, Inc., Orson Welles, and Welles' production company arguably prohibited such alteration.

121. See testimony of Steven Spielberg, **1988 Senate Berne Hearings** at 529.

122. Unofficial transcript at 88. Assuming such a public interest does exist "beyond collective bargaining," the question is raised whether the entire collective bargaining agreement should then be renegotiated. Congress might conclude it could be unfair to alter that agreement by legislatively granting directors rights they were not able to obtain through collective bargaining, while leaving the agreement intact for those provisions favorable to the directors.

Pollack during the Subcommittee's September 30, 1987 Berne hearings:

> We are prevented from negotiating to the point of that kind of control [i.e., on a moral rights clause] by our collective bargaining agreement. We are still working for hire, and we are still employees. We cannot negotiate for total control over the product legally. [123]

Elliot Silverstein, Chairman of the President's Committee of the DGA elaborated on this point:

> It is very clear that we are governed as a labor union by the labor law which gives the right to control to the employer, and we don't seek in any way to allow our position to come into collision with that requirement of labor law.
>
> If moral rights began at an earlier point than we suggest [post exhibition release], it would be a collision there, so that what we are looking for is that point after the employer, employee relationship has completed its defined role and something exists that can be protected. We, as a matter of fact, I can tell you in our recent negotiations completed this last summer, we were told specifically that the things we were asking for pushed right up against the so-called final cut, that is the final creative authority and we could not go any further.
>
> It was no longer a mandatory subject of bargaining and we were in danger of stepping out from under the protection of the anti-trust laws, and becoming independent contractors, if we didn't submit to the right to control definition. So we can only go so far in negotiations. [124]

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123. House Berne Hearings at 519.

124. Id. at 535.

In hearings before the Senate on March 3, 1988, the directors again raised this issue. [125] The producers contest this interpretation of the labor laws, and note that they have bargained with the DGA for almost a half century on a wide variety of issues.

In any event, since the DGA's concern about its status as a labor organization seems to apply only to efforts to control the initial theatrical release form of the film, and the DGA seeks from Congress only rights to control the post-theatrical release form of the film, it appears there is no restriction in the labor laws, even under the DGA's interpretation of them, on the DGA's ability to collectively bargain for precisely the rights they have sought from Congress. The fact that they have not obtained these rights may, perhaps, be ascribed to nothing more than the ordinary give and take of labor negotiations. Nor is it out of the question that directors may obtain the desired rights in the future, as the following colloquy at the Copyright Office's September 8, 1988 hearing suggests:

> MR. PATRY [Copyright Office]: Would you agree that the most that directors are going to get from collective bargaining is the right of consultation, and not the right of final say over colorization and editing?
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> MR. MAYER [Turner Entertainment]: Not necessarily, although I would hope that that's the result. I do not think it's an idle possibility that they could

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125. See testimony of Steven Spielberg, 1988 Senate Berne Hearings at 528 ("[b]ecause we work for hire and our union, our labor union, can't really negotiate into th[e] area [of pre-release alterations] without affecting our definition as a labor union."); id. at 584 (testimony of Elliot Silverstein).

> get these rights; because I would say to you that many of the creative rights that they have obtained in the past, such as the right to a first cut, the right to preview, the right to edit for television. I've sat around many, many meetings where the producers said, "No way we will ever give anything like that. It will ruin the business. There is just no way," and in some way they figured out a way.
>
> ...
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> ... Is it possible in collective bargaining they could obtain the right to veto? Yes, it is possible. Is it likely? Probably not. [126]

The reasons producers give for not wanting to accord the directors the desired rights appear to be economic, not aesthetic. [127] The Motion Picture Association of America has stated:

> In order to improve the odds of financial success,

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126. Transcript at 83-84.

127. One down-to-earth way of making this point was given by Bernard Weitzman of American Film Technologies at our September 8, 1988 hearing:

> Now one of the things that we can't do with the director ... is give the director absolute final control. Some directors will never let a picture go. They will work on it interminably, because they feel it could always be improved, and if anybody else touches it, it's bad. Well, we can't run a business if somebody says we are going to do it as long as we want to do it. We can never meet air dates. We can never meet budgets. We can never meet cost control. We can't do anything if the director has the absolute right to decide what's good or bad.
>
> Transcript at 53.

> the copyright owners must have the freedom to adapt their productions to the differing needs of the various markets. If legislation were enacted that called into question the copyright owner's ability to do that, the wide-spread performance of their products so essential to recoupment of these huge investments would be seriously jeopardized. [128]

The National Association of Broadcasters stated:

> An inability by the broadcasters to insert commercials into the program or to compress the program to conform to the limits of television technology, absent some agreement with the artist, would make it commercially unprofitable to show such programs not supported by advertising. The effect would be the end of commercial television as we know it. [129]

These dire projections, however, assume that directors (and other creative participants) would on occasion exercise their rights irresponsibly. The directors credibly testified that they have sound economic reasons for exercising rights in a reasonable manner. [130]

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128. Comment #5 at 6. In cases where the director has net profit participation in the film, he or she has an obvious stake in the financial success of the work as well. Additionally, financial failure can harm a director's future ability to obtain employment.

129. Comment #16 at 15.

130. See **House Berne Hearings** at 532; **1988 Senate Berne Hearings** at 504 (testimony of Steven Spielberg: "If a director or a writer does not agree to an alteration of a finished film which is desired by the financier, it is highly likely he or she will not be employed by the financier... ."); testimony of Roger Mayer at Copyright Office September 8, 1988 hearing, Transcript at 84-86

The directors do not, however, seek changes in the labor laws to help them achieve their goals. Instead they seek amendment of the Copyright Act to provide for a high level of moral rights, a topic to which we now turn.

CHAPTER 5: MORAL RIGHTS

Before addressing the details and merits of the directors' demands for new moral rights legislation, it will be helpful to review the nature and history of those rights.

The Nature of Moral Rights

The term "moral rights" conjures up a variety of associations, some of which concern themselves with copyright law.[131] Professor Ricketson writes:

> Authors' rights have long been recognized as having a non-economic dimension [which] ... can be seen as an emanation or manifestation of [the author's] personality. ... Any author, whether he writes, paints or composes, embodies some part of himself- his thoughts, ideas, sentiments and feelings - in his work, and this gives rise to an interest as deserving of protection as any of the other personal interests protected in the institutions of positive law, such as reputation, bodily integrity and confidences. The interest in question relates to the way in which the author presents his work to the world, and the way in which his identification with the work is maintained. ...
>
> In European legal doctrine, the interest protected has usually been called the author's "moral

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131. Cf. Comment #17, September 28, 1988 letter from Morality in Media, Inc., for a somewhat different interpretation of the term.

> interest" and the rights which protect this interest are referred to as the author's "moral rights." The adjective "moral" has no precise English equivalent, although "spiritual," "non-economic" and "personal" convey something of the intended meaning.[132]

The Ad Hoc Working Group on U.S. Adherence to the Berne Convention identified four general categories of moral rights: (1) right of publication; (2) right of recall; (3) right to claim authorship; and, (4) right to protect the integrity of the work. [133]

Moral Rights Under the Berne Convention

The Paris text of the Berne Convention, to which the United States adhered on March 1, 1989, refers in Article 6bis to only two of several rights that might be regarded as "moral rights:" the right to claim authorship, and the right to protect the integrity of the work. [134]

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132. Ricketson, **The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986 (1987)** at 456 (hereinafter "Ricketson").

133. Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention("Ad Hoc Working Group Report"), reproduced in **U.S. Adherence to the Berne Convention, Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm., 99th Cong., 1st & 2d Sess. 460 (1986)("1986 Senate Berne Hearings")**. For a comprehensive listing of rights under copyright which are denominated "moral rights" under the laws of one or more Berne Union member states, see **WIPO GLOSSARY OF TERMS OF THE LAW OF COPYRIGHT & NEIGHBORING RIGHTS** 158 (1980).

134. Article 6bis(1) reads: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action

Regarding the first of these, the W.I.P.O. Guide to the Berne Convention

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in relation to, the said work, which would be prejudicial to his or her honor or reputation." See also id., paragraph 2 and commentary thereon in **W.I.P.O. Guide** at 44 for discussion on the required term of moral rights.

The Ad Hoc Working Group Report concluded that Article 6bis does not "explicitly grant a right of recall, and the absence of that provision from the laws of several members indicates that 'recall' cannot be considered a right granted by Article 6bis." **Final Report**, reproduced in **1986 Senate Berne Hearings** at 461.

U.S. law provides the exclusive right of first publication in 17 U.S.C. Sec. 106(1)(1978). See generally discussion of this right in Harper & Row, Pub., Inc. v. Nation Enterprises, 471 U.S. 539 (1985). But cf. comments of Professor John M. Kernochan, **1986 Senate Berne Hearings** at 170. For an interesting conflict between an exclusive licensee's right of publication and the author's moral right not to have an unfinished manuscript published, see Society of the Survivors of the Riga Ghetto, Inc., 188 NY Misc. LEXIS (Sup. Ct. NY)(No. 29972186, as amended Dec. 1988).

The issue of whether moral rights are waivable was the subject of some controversy during the hearings on the Berne Implementation Act legislation. See e.g., **1986 Senate Berne Hearings** at 94; **The Berne Implementation Act of 1987: Hearings on H.R. 1623 before the Subcomm. on Courts, Civil Liberties and The Administration of Justice of the House Judiciary Comm., 100th Cong., 1st & 2d Sess. 40, 367-369, 1168 (1987 and 1988)("House Berne Hearings"); The Berne Convention: Hearings on S.1301 and S.1971 before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm., 100th Cong., 2d Sess. 289-300 (1988)("1988 Senate Berne Hearings")**. Cf. Comment #2 submitted to the Copyright Office in this inquiry, Statement of the Max Planck Institute for Foreign and International Patent, Copyright, and Competition, at pp. 6-7:

> [T]he courts in most European countries do accept that the author may either transfer or waive the power to exercise his moral rights. However, each moral right has what is called a "positive nucleus," which is regarded as being so vital to the expression of the respective personality that any waiver in this respect would be null and void.

See also id. at p. 12 "any 'gross distorsion' [sic] or other 'gross injuries,' ... certainly form part of this 'positive nucleus.'"

summarizes:

> This right ... may be exercised by the author as he wishes; it can even be used in a negative way i.e., by publishing his work under a pseudonym or by keeping it anonymous, and he can, at any time, change his mind and reject his pseudonym or abandon his anonymity. Under it, an author may refuse to have his name applied to a work that is not his; nor can anyone filch the name of another by adding it to a work the latter never created. The right ... is exercisable even against those permitted by the Convention to reproduce the work or to take extracts from it; the author's name must be mentioned. [135]

The so-called "right of integrity" concerns the ability of the author to defend against or seek redress for unauthorized changes to or uses of his or her work which are mutilating, distorting, or otherwise prejudicial to the artist's honor or reputation.

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135. W.I.P.O. Guide to the Berne Convention for the Protection of Literary and Artistic Works 41 (1978).

The Universal Copyright Convention, to which the United States also adheres, does not require moral rights. In the Report of the Rapporteur-General on the Universal Copyright Convention it is stated that the text of the Preamble to the Convention reflected the desire of some delegations to "avoid reference to 'droit moral'," **Records of the Intergovernmental Copyright Conference** 73 (UNESCO 1952) and that a proposal by Greece to include a reference in Article I of the Convention to the "droit moral" of the author was defeated. Id. at 74. See also Minutes of the Conference, id. at paragraphs 1, 58, 100, 107, 112, 116, 118, 126, 141, 148, 378, 380, 383, 391, 393, 403-405, 408-410, 417,535, 873-876, 879, 880, 882, 883, 904, 932, 1453, 2002, 2003, 2006, 2008, 2010, 2013, 2014, 2019, 2024-2026, 2032, 2035, 2042, 2067, 2087, 2590-2594, 2598, and Working Documents DA/2, 69, 77, 101, 107, 112, 115, 116, 122, 123, 143, 162, 173, 182, 206. But cf. Bogsch, **The Law of Copyright Under the Universal Copyright Convention** 65-66 (3d Ed. 1968); Dietz, Elements of moral right protection in the Universal Copyright Convention, **21 UNESCO 17 (1987).**

Moral Rights Under the Copyright Act

While the Copyright Act contains provisions respecting pseudonymous and anonymous works, [136] it does not provide a cause of action for violations of the author's wish to use a pseudonym or to remain anonymous. Such protection may be available, however, under various state law theories. [137]

The Copyright Act similarly does not provide for the right to protect the integrity of the work. Although the right to prepare derivative works granted in Section 106(2) is frequently cited as a component of the right of integrity, Article 6bis refers to moral rights as being independent of economic rights, and thus it is hard to see how Section 106(2) would permit an author to protect the integrity of his or her work if he or she had previously transferred all Section 106(2) rights. [138]

Moral Rights in the Case Law

U.S. case law on moral rights claims has been extensively discussed

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136. See 17 U.S.C. Sec. 101 (definitions of the terms); Sec. 302(c)(term of protection for such works).

137. See Clemens v. Press Publishing Co., 122 N.Y. Supp. 206 (1910); Ellis v. Hurst, 121 N.Y. Supp. 438 (1910).

138. See generally, Kerever, The Insertion of Advertising in Films Screened on Television, 32 COPYRIGHT 10 (1988).

in law review articles. [139] We will, therefore, only summarize those

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[139]. See, e.g., Roeder, The Doctrine of Moral Rights: A Study in the Law of Artists and Creators, 53 HARV. L. REV. 554 (1940); Katz, The Doctrine of Moral Right and American Copyright Law - A Proposal, 24 SO. CAL. L. REV. 375 (1951); Stevenson, Moral Right and the Common Law: A Proposal, 6 COPYRIGHT LAW SYMPOSIUM (ASCAP) 89 (1955); Strauss, The Moral Right of the Author, COPYRIGHT OFFICE STUDY NO. 4, 86th Cong., 1st Sess. 109 (1959)(Comm. Print); Treece, American Law Analogues of the Author's "Moral Right," 16 AM. J. COMP. LAW 487 (1968); Grant, The Doctrine of Droit Moral: Its Place in American Copyright Law, 16 HOW. L.J. 531 (1971); Comment, Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrine, 60 GEO. L. J. 1539 (1972); Valentine, Copyright: Moral Right - A Proposal, 43 FORDHAM L. REV. 793 (1975); Comment, Protection of Artistic Integrity: Gilliam v. ABC, 90 HARV. L. REV. 473 (1976); Goldberg, "Moral Right" in American Law, 43 BROOKLYN L. REV. 1043 (1977);Comment, The Monty Python Litigation - Of Moral Right and the Lanham Act, 125 U. PA. L. REV. 611 (1977); Comment, Moral Rights for Artists Under the Lanham Act: Gilliam v. American Broadcasting Co., 18 WM. & MARY L. REV. 595 (1977); Diamond, Legal Protection for the "Moral Rights" of Authors and Other Creators, 68 TRADEMARK REPORTER 224 (1978); Comment, An Author's Artistic Recognition under the Copyright Act of 1976, 92 HARV. L. REV. 1490 (1979); Maslow, Droit Moral and Sections 43(a) and 44(i) of the Lanham Act - A Judicial Shell Game?, 48 GEO. WASH. L. REV. 377 (1980); De Silva, Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States, 28 BULL. COPR. SOC'Y 1 (1981); Rosen, Artists' Moral Rights: A European Evolution: An American Revolution, 2 CARDOZO ARTS & ENT. L. J. 155 (1981); Amarnich, Recognition of the Moral Right: Issues and Options, 29 COPYRIGHT LAW SYMPOSIUM (ASCAP) 31 (1983); Hathaway, American Law Analogues to the Paternity Element of the Doctrine of Moral Rights: Is the Creative Artist in America Really Protected?, 30 COPYRIGHT LAW SYMPOSIUM (ASCAP) 121 (1983); Note, Moral Rights and the Realistic Limits of Artistic Control, 14 G.G. U. L. REV. 447 (1984); Davis, State Moral Rights and the Federal Copyright System, 4 CARDOZO ARTS & ENT. L. J. 233 (1985); Kwall, Copyright and the Moral Right: Is an American Marriage Possible?, 35 VAND. L. REV. 1 (1985); Ginsburg, The Right of Integrity in Audiovisual Works in the United States, 135 R.I.D.A. 2 (1988). For a sampling of articles on moral rights in foreign countries, see Ricketson, supra, at 456 n.435.

For articles on colorization, see, e.g., Bader, A Film of a Different Color: Copyright and the Colorization of Black and White Films, 5 CARDOZO ARTS & ENT. J. 497 (1986); Kohs, Paint Your Wagon Please! Colorization, Copyright and the Search for Moral Rights, 40 FEDERAL COMM. L. J. 1 (1987); Note, Black and White and Brilliant: Protecting Black and White Films from Color Recoding, 9 HASTINGS COMM/ENT. L. J. 522 (1987); Gibaldi, Artists' Moral Rights and Film Colorization: Federal Legislative Efforts to Provide

decisions as they relate to the two rights specified in Article 6bis of the Berne Convention and, where possible, as they relate to motion pictures.

1. Right to claim authorship

There are two aspects to the right to claim authorship: (1) the right to insist upon or disclaim authorship; and, (2) the right to prevent misattribution of authorship.

In general, the mere failure to credit an author has not constituted copyright infringement. [140] It may, however, constitute "reverse palming off" under Section 43(a) of the Lanham Act. [141] As discussed further below, certain states provide a right of attribution or disclaimer for specific classes of works, such as works of the fine arts. For example,

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Visual Artists with Moral Rights and Resale Royalties, 38 SYR. L. REV. 965, 968-969 (1987); Note, Artists' Rights in the United States: Toward Federal Legislation, 25 HARV. J. LEGIS. 153 (1988); Note, The Colorization of Black & White Films: An Example of the Lack of Substantive Protection for Art in the United States, 63 NOTRE DAME LAWYER 309 (1988); Note, Moral Rights Protections in the United States in the Colorization of Black & White Motion Pictures: A Black & White Issue, 26 HOFSTRA L. REV. 503 (1988); Beyer, Internationalisms, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights, 82 Nw. U. L. REV. 1011 (1988); Ginsburg, Colors in Conflict: Moral Rights and the Foreign Exploitation of Colorized U.S. Motion Pictures, 36 J. COPR. SOC'Y 81 (1988).

140. Locke v. Times Mirror Magazine, Inc., CCH COPR. Para. 25,750 (SDNY 1985); Wolfe v. United Artists Corp., 742 F.2d 1439 (2d Cir. 1983)(Wolfe I); Wolfe v. United Artists Corp. 583 F. Supp. 52 (ED Pa. 1984)(Wolfe II); Suid v. Newsweek, Inc., 503 F. Supp. 146 (DDC 1980). Cf. Peckarsky v. ABC, 603 F. Supp. 688, 697-698 (DDC 1984)(decision unclear).

141. Lamothe v. Atlantic Recording Co., 847 F.2d 1403 (9th Cir. 1988); Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981)(one actor's name substituted for another's).

California has made it a violation of its law to fail to give proper credit, including screen credit to actors. [142]

The importance of the right to receive credit in the motion picture industry has long been noted: "It can be fairly said that in the entertainment industry the credit clauses of an agreement are often considered of greater importance than the provisions for monetary compensation." [143] Crediting (attribution) is, in a real sense, one's resume. The failure to achieve proper attribution could have an adverse impact on one's ability to earn a livelihood, or to market freely one's creative labor. For this reason, the guilds, including the Directors Guild of America and the Screen Actors Guild, have long engaged in collective bargaining on the issue. [144]

Guild agreements represent minimum standards. Individual directors'

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142. See CAL. BUS. & PROF. CODE Secs. 17200, 17203; Meta-Films Associates, Inc. v. MCA, Inc., 568 F. Supp. 1346, 1364 (CD Cal. 1984) and, generally, Note, Giving the Devil Its Due: Actors' and Performers' Right to Receive Attribution for Cinematic Roles, 4 CARDOZO ARTS & ENTERTAINMENT L.J. 299 (1985)("1985 Cardozo Note"); Berman & Rosenthal, Screen Credit and the Law, 9 U.C.L.A. L. REV. 156 (1962)("Berman & Rosenthal").

143. Berman & Rosenthal, supra, at 156. See also Selz & Simensky, Entertainment Law (1983), Chapters 8-16, for an exhaustive treatment of the subject.

144. See DGA Basic Agreement Secs. 8-102 (form of credit); 201 (screen credit); 202 (visibility of director's name); 203 (credits on paid advertising, including size and location of credit, title of motion picture, "one sheets," outdoor-type advertising, trade paper advertising, advertising in newspapers, magazines and periodicals); 203 (phonorecords, books and tapes); 207 (theatrical and souvenir programs); 208 (videodisc/videocassette containers); and, generally, 300 (credit for directors of television films).

and actors' contracts may, and almost always do, contain greater credit requirements. [145] Disputes have arisen both over the meaning of such contractual provisions, and in circumstances where the artist's individual contract is silent on the nature of the proper attribution. And, although cases such as Harris v. Twentieth Century- Fox Film Corp., 43 F. Supp. 119 (SDNY 1942) and Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947) have been cited for the proposition that an author cannot require his or her name to be applied to a work unless the contract expressly requires it, these cases have involved express transfers of all rights. By contrast, another case, in dictum, stated: "Courts will protect against...the omission of the author's name unless, by contract, the right is given to the publisher to do so... ." [146]

The differences in approaches taken by courts may reflect different approaches to construction of contracts. One court may find that an author who enters into a contract has thereby transferred away all rights not specifically reserved, while another may find that the author retains everything not specifically granted. [147]

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145. See DGA Basic Agreement Sec. 8-104 ("any Director shall have the right to negotiate for any credit in excess of minimum").

146. Harms, Inc. v. Tops Music Enterprises, 160 F. Supp. 77 (SD Cal. 1958). See also Clemens v. Press Pub. Co., 122 NYS 206 (1910)("The purchaser [of a literary work] cannot garble it, or put it out under another name than the author's; nor can he omit altogether the name of the author, unless his contract with the latter permits him so to do.")

147. See review of the cases in 1985 CARDOZO NOTE, supra, at 312-315. But cf. Gilliam v. ABC, 538 F.2d 14, 22 (2d Cir. 1976)("omission of any terms [in contract] concerning alterations in the program after recording must be read as reserving ... exclusive authority for such revisions");

The rule where there is no written contract is uncertain. One commentator has concluded there is no clear U.S. authority for a right to claim authorship. [148] But, in a recent case, Edison v. Viva Int'l. Ltd., 209 USPQ 345, 347 (NY App. Div. 1979) it was broadly held "[w]here ... the parties have entered into a contract of publication, plaintiff's so-called 'moral right' is controlled by the law of contract... ." Where the contract is silent on particular issues, the court indicated custom and usage are to be examined. [149]

2. Misattribution of authorship

Most cases involving failure to credit, however, arise under facts where there is also misattribution of authorship. It is quite rare that a work is published without any statement of authorship at all. [150] It

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Warner Bros. Pictures, Inc. v. CBS, 216 F.2d 945 (9th Cir. 1954)(character rights in novel reserved unless specifically granted).

148. See statement of Professor Edward J. Damich before the Subcommittee, in House Berne Hearings at 545.

149. The decision in Edison was based on similar language in Seroff v. Simon & Schuster,Inc., 162 NYS2d 770 (Sup. Ct. NY 1957), which in turn was based on a law review article, Chafee, Reflections on the Law of Copyright, 45 COLUM. L. REV. 719, 729 (1945).

150. But cf. FEL Publications v. Catholic Bishop of Chicago, 214 USPQ 409 (7th Cir.), cert. denied, 459 U.S. 131 (1982)(omission of compiler's name from collection of hymnals may state cause of action under Section 43(a) of the Lanham Act); Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1498-1499 (DC Cir. 1988), cert. granted on other grounds, __ U.S. ___ (Nov. 8, 1988; argued March 29, 1989)("Independent of Reid's ownership of the copyright, CCNV might be obliged to credit Reid as an author of the sculpture").

appears well established that a misattribution of the actual authorship of a work constitutes a violation of Section 43(a) of the Lanham Act. [151]

However, this sort of a misattribution of an author's contribution to the creation of a work differs from situations where a work is subsequently altered in a manner which a credited author believes to be so changed as to no longer represent his or her vision. Since the reproduction of substantial portions of a copyrighted work, in either the original or in a distorted form, will constitute copyright infringement absent a contractual right to reproduce the work, most disputes have involved interpretations of the scope of a transfer or assignment of reproduction or performance rights in the work, with the licensee claiming it has the right to make the disputed alterations.

In Gilliam v. ABC, 538 F.2d 14, 27 (2d Cir. 1976), a leading case on the issue, Judge Gurfein, in a concurring opinion, wrote:

> If the licensee may, by contract, distort the recorded work, the Lanham Act does not come into play. If the licensee has no such right by contract, there will be a violation in breach of contract. The Lanham Act can hardly apply literally

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151. See Lamothe v. Atlantic Record Co., 847 F.2d 1403 (9th Cir. 1988); Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981)(removal of actor's name from film credits and substitution of another's name); Dodd v. Fort Smith Special School Dist. No. 100, 666 F. Supp. 1278 (WD Ark. 1987)(substitution of teacher and students' names); Marling v. Ellison, 218 USPQ 702 (SD Fla. 1982)(infringing work); Wildlife International, Inc. v. Clements, 591 F. Supp. 1542 (SD Ohio 1984)(advertising brochures falsely stated the infringing work represented "the artistic standards now associated with [the artist] and that [the artist] approves of the quality"); Follet v. Arbor House, 497 F. Supp. 394 (SDNY 1968)(misstatement of author's contribution); Geisel v. Poynter, 283 F. Supp. 261; 295 F. Supp. 331 (SDNY 1968)(false representation of sponsorship). Relief has also been provided under a theory of libel. See Ben-Oliel v. Press Pub. Co., 251 N.Y. 250, 256 (1929).

> when the credit line correctly states the work to be that of the plaintiffs which, indeed it is, as far as it goes.
>
> The vice complained of is that the truncated version is not what the plaintiffs wrote. But the Lanham Act does not deal with artistic integrity. It only goes to misdescription of origin and the like.

Significantly, this view does not appear to have been shared by the majority, which indicated such actions could violate the Lanham Act. [152]

Similar reliance on contract rights was placed by the court in Granz v. Harris, 198 F.2d 585 (2d Cir. 1952), in which it was held: "[a]n obligation to mention the name of the author carries the implied duty, however, as a matter of contract, not to make such changes in the work as would render the credit line a false attribution of authorship." A more expansive view of the situation was offered by Judge Frank in his concurring opinion in Granz:

> An artist sells one of his works to the defendant who substantially changes it and represents the altered matter to the public as that artist's product. Whether the work is copyrighted or not, the established rule is that, even if the contract with the artist expressly authorizes reasonable modifications (e.g., where a novel or stage play is sold for adaptation as a movie), it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original. [153]

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152. Id. at 24-25.

153. But cf. Jaeger v. American International Pictures, Inc., 330 F. Supp. 274 (SDNY 1971)(stating that Granz "differ[s] substantially from ... a large-scale collaborative work like a movie.").

The right to claim or disclaim authorship may have application to alterations of motion pictures in a number of circumstances. For example, a film, originally shot in black and white, is, without the consent of the director (but pursuant to a transfer of "all rights") color encoded and marketed as "Jane Smith's Godzilla 1950: The Colorized Version." It may be argued that, under these circumstances, a false impression of association with the color encoded work is created. Of course, the inclusion of statements or labelling disclosing the director's nonassociation with the color encoded version, considerably, if not completely, diminishes the cause of action. [154]

A more difficult case arises with panning/scanning and lexiconning

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Older state cases provided relief under various state theories. See, e.g., Chesler v. Avon Book Division, 352 NYS2d 552 (NY Sup. Ct. 1973)("Although the authorities are sparse, it is clear that even after a transfer or assignment of an author's work, the author has a property right that it shall not be used for a purpose not intended or in a manner which does not fairly represent the creation of the author."). But cf. Edison v. Viva International, Ltd., 421 NYS2d 203 (NY Sup Ct. 1979)("To publish in the name of a wellknown author any literary work, the authorship of which would tend to injure an author holding his position in the world of letters, has been held to be libel. ... In the third cause of action, the plaintiff avers that the defendant published an article different in form and content from his original work. To state that the published work was different from the original is not to state that the plaintiff was libeled").

154. Cf. Gilliam v. ABC, supra, 538 F.2d at 25 n.13 (majority); id. at 27 n.1 (concurring opinion). See also Consumers Union of the United States v. General Signal Corp., 724 F.2d 1044, 1053 (2d Cir. 1983)("disclaimers are a favored way of alleviating consumer confusion... ."); National Film Preservation Act of 1988, contained in Interior Appropriations Act for fiscal year 1989, P.L. 100-466 (establishing National Film Preservation Board and labelling requirements for certain materially altered films).

done without the director or other creative participants' authorization, but pursuant to a transfer of all rights. A claim that such actions constitute a false attribution of authorship demonstrates the interaction between the right of attribution and the right of integrity. We assume most cases would arise under circumstances where changes to a work for which an author is credited would involve distortions or mutilations of the work. These cases are, thus, derivative of the right of integrity.

2. The Right of Integrity

Article 6bis of the Berne Convention does not bar all modification to a work; it only prohibits those that are "prejudicial to the [author's] honor or reputation." [155]. The W.I.P.O. Guide to the Convention contains this discussion on the right:

> The formula is very elastic and leaves a good deal of latitude to the courts. Generally speaking, a person permitted to make use of a work ... may not change it either by deletion or by making additions. A producer may not, on his own authority, delete several scenes from a play nor a publisher strike out chapters from a narrative. The

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[155]. But cf. contrary views of certain Belgian and French commentators, discussed in **Ricketson**, supra at 472-473. See also Kerever, The Insertion of Advertising in Films Screened on Television, **32 COPYRIGHT 10, 12 (1988)**, in which the wording of Article 6bis is interpreted as "reflect[ing] a choice between two conceptions of the application of moral rights: a subjective conception, whereby the author has the discretionary power to consider that the modification harms his reputation, and an objective conception requiring that the reality of the prejudice to his reputation be established by society, and hence by the judge in the event of litigation. Article 6bis adopted this latter approach."

> problem becomes more delicate when it is a case of adaptation; for example when writing a play or making a film from a novel, one cannot insist that the adaptor sticks [sic] strictly to the text. Means of expression differ and the change to stage or screen calls for modifications. But the adaptor's freedom is not absolute; this "right of respect" allows the author to demand, for example, the preservation of his plot and the main features of his characters from changes which will alter the nature of the work or the author's basic message. The Convention speaks of prejudice to honor or reputation. The formula is very general. The author must decide whether the fact that the text was, during its adaptation to the theatre or screen, given a slightly pornographic twist to meet the taste of some members of the audience, ruined his reputation as a serious author or, on the contrary, gave his work a flavour more suitable to a later age. [156]

Among the examples of distortions, mutilations, or other modifications offered by Ricketson are "imperfections in reproduction techniques (including poor or wrong colours in the case of artistic works)" and alterations of "location, period or 'atmosphere' of a [dramatic] piece" by a cinematographic director. [157] These changes would, however, still have to be prejudicial to the author's honor or reputation in order to constitute a violation of the right of integrity.

There have been only a very few U.S. cases providing relief (or indicating relief would be available) under the Copyright Act for activities

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156. **W.I.P.O. Guide** at 42.

157. **Ricketson** at 468-469.

encompassed by the right of integrity. [158] In Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1498-1499 (DC Cir. 1988), cert. granted on other grounds, __ U.S. ___ (Nov. 8, 1988; argued March 29, 1989), the District of Columbia Court of Appeals indicated that an author has a right against the copyright owner if the owner "should publish an excessively mutilated or altered version" of the work, citing among other authorities, the Ad Hoc Working Group report's conclusions that existing common law doctrines and statutes are sufficient to meet the requirements of Article 6bis of the Berne Convention.

The more typical comment, however, is that found in Gilliam v. ABC, 538 F.2d 14, 24 (2d Cir. 1976): "American copyright law ... does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate economic, rather than the personal, rights of authors." Gilliam, like almost all of the integrity claims, also involved issues of contract interpretation. [159] Where a contract gives a

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158. See National Bank of Commerce v. Shaklee Corp., 503 F. Supp. 533 (WD Tex. 1980)(unauthorized addition of advertising materials in book held infringement); WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622, 626 (7th Cir. 1982)("if the publisher of a book leaves the inside covers blank, the book seller [cannot] inscribe the Lord's Prayer on them in order to broaden the book's appeal"); Gee v. CBS, 471 F. Supp. 14, 24 (ED Pa. 1979)(indicating that infringement would lie where alterations were done to "intentionally ridicule or humiliate" the author).

159. But see Preminger v. Columbia Pictures Corp., "the law is not so rigid, even in the absence of a contract, as to leave a party without protection against publication of a garbled version of his work." 267 NYS2d 594 (Sup Ct.), aff'd, 269 NYS2d 913 (App. Div.), aff'd mem., 273 NYS2d 80 (NY 1966).

A related question is whether the terms of the contract conveying rights include particular technologies, especially those not in existence at

licensee certain rights, the licensee is bound by the terms of the contract.

In Gilliam, the court found that ABC's substantial editing went beyond the

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the time of the contract. See generally, Cohen v. Paramount, 845 F.2d 851, 854 (1988)(composer who had licensed right to record work "on television" had not conveyed right to record work on videocassettes primarily because VCRs "were not invented or known in 1969, when the license was executed"); Goodis v. United Artists Television, 425 F.2d 397 (2d Cir. 1970); Bartsch v. MGM, Inc., 391 F.2d 150 (2d Cir.), cert. denied, 393 U.S. 826 (1968); Autry v. Republic Productions, Inc., 213 F.2d 667 (9th Cir.), cert. denied, 348 U.S. 858 (1954); Cinema Corp. of America v. De Mille, 267 NYS 327 (Sup. Ct.), aff'd, 267 NYS 959 (1933); Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), cert. denied, 351 U.S. 926 (1956).

In the context of the technologies raised in this inquiry, the claim would be that color encoding, panning/scanning, or lexiconning were unknown technologies at the time the transfer was made, and thus, the right to alter the work could not have been conveyed. In order to test the strength of such claims, one would have to examine the date of the contract, the language of the grant, and the date of the particular technology. Panning and scanning, for example, has existed since about 1961. The first broadcast of a color encoded black and white motion picture occurred in 1985.

Recently, an issue of contractual interpretation perhaps somewhat along the lines suggested here was addressed by some of the parties involved in this inquiry. On February 14, 1989, the Turner Entertainment Company announced that it had discontinued preparation for the colorization of "Citizen Kane," based upon a review of the contract between RKO Pictures, Inc., Orson Welles, and his production company Mercury Productions. It was the Turner company's conclusion that "[w]hile a court test might uphold our legal right to colorize the film, provisions of the contract could be read to prohibit colorization without permission of the Welles Estate." It is unknown how many other directors have similar contractual provisions.

The laws of certain foreign countries make the distinction along the lines discussed above, but with an emphasis on whether the new technology represents a new economic market. As one submission commented, the test in West Germany is whether there is "a new and technically as well as economically distinct and separable way of exploitation." Statement of the Max-Planck-Institute for Foreign and International Patent, Copyright, and Competition Law, Comment No. 2, at p. 9. See West German statute at Secs. 31(4) and 89(1). The purpose of this distinction is to let authors "participate in any further exploitation, the economic impact of which [they] couldn't have judged and foreseen at the time when bargaining for remuneration." Id.

rights it had contractually been granted. The court also found, however, that plaintiffs were likely to prevail on a claim ABC had violated Section 43(a) of the Lanham Act [160] by "broadcasting a program properly designated as having been written and performed by [plaintiffs], but which has been edited, without their consent, into a form that departs substantially from the original work." 538 F.2d at 24. This action "impaired the integrity of appellants' work and represented to the public as the product of appellants what was actually a mere caricature of their talents," id. at 25; "in such a case, it is the writer or performer, rather than the network, who suffers the consequences of the mutilation, for the public will have only the final

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160. This provision, as amended by P.L. 100-67, 100th Cong., 2d Sess.; 102 Stat. 3935 (1988), reads:

> (a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which --
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> > (1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
> >
> > (2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act. 15 U.S.C. 1125(a)(1988).

product by which to evaluate the work." Id. at 24. [161]

The Gilliam court, however, rejected plaintiffs' claim that, absent a contractual right to edit a work, no changes could be made, holding "[c]ourts have recognized that licensees are entitled to some small degree of latitude in arranging the licensed work for presentation to the public in a manner consistent with the licensee's style or standards." 538 F.2d at 23.

Of particular interest is the exclusion from the labelling

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161. See also Autry v. Republic Pictures Productions, Inc., 213 F.2d 667, 670 (9th Cir.), cert. denied, 348 U.S. 858 (1954)(although court found that defendant had the contractual right to show edited versions of film on television with commercials, it disapproved of the lower court's finding that the defendant possessed the right to "so alter or emasculate the motion pictures as to render them substantially different from the product which the artist created"); Preminger v. Columbia Pictures Corp., 267 NYS2d 594 (N.Y. Sup. Ct. NY.), aff'd, 269 NYS2d 913 (1st App. Div.), aff'd mem., 273 NYS2d 80 (NY 1966)(while minor editing for television permitted in the absence of a contractual provision to the contrary and where director knew of industry practice, the editing of a 53 minutes from a 161 minute film would constitute an actionable mutilation); Stevens v. NBC, 148 USPQ 755; 150 USPQ 572 (Cal. Sup. Ct. 1966)(contempt proceeding)(court has the right to protect the artistic integrity of a product; while contract read to give network right to insert commercials into broadcast of motion picture "the commercials must not be inserted so as to alter or adversely affect or emasculate the artistic or pictorial quality of the film, or destroy or distort materially or substantially the mood, the effect or the continuity of the film"); 76 Cal. Rptr. 106 (Ct. App. 2d Div. 1969).

Authors have fared less well in suits against motion pictures or television broadcasts that have allegedly violated their moral rights in the adaptation to the screen. See Prouty v. NBC, 26 F. Supp. 265 (D. Mass. 1939); Shostokovich v. Twentieth Century-Fox Film Corp., 80 NYS2d 575 (NY Sup. Ct. 1948), aff'd, 87 NYS2d 430 (1st Dept. 1949)(but cf. Societe Le Chant du Monde v. Societe Fox Europe et Societe Fox Americaine Twentieth Century, [1954], D. Jur. 16, 80 (Cour Appel, Paris)(injunction granted against inclusion of same composer's works in same film granted)); Dreiser v. Paramount Publix Corp., 22 **Copyright Office Bulletin** 106 (NY Sup. Ct. 1938).

requirements contained in the National Film Preservation Act of 1988, of changes made as part of "customary practices and standards and reasonable requirements of preparing a work for distribution or broadcast." In a colloquy on this provision, Representative Mzarek stated that it was the House-Senate conferees' belief that this provision excludes editing for television, time compression, and colorization, but not panning and scanning. [162] Representative Fazio disagreed, [163]. Senator DeConcini, with Senator Johnston's concurrence, stated that panning and scanning was included. [164]

One effect of these exclusions might be unintended: if a label is not affixed stating the film has been "materially altered," arguably, a Section 43(a) violation might lie. If such a label is affixed, one would probably not. [165]

STATE LAWS

Nine states have passed legislation granting limited moral rights to limited classes of works, principally works of the fine arts.

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162. 134 Cong. Rec. H7246 (Sept. 8, 1988).

163. Id. at H7246-7247.

164. Id. at S12009-12010.

165. See comments of the Directors Guild of America before the Patent and Trademark Office, Docket No. 80743-8143 at pp. 3-4, and id. at 5-6 (proposed legislative changes); **House Berne Hearings** at 1260-1262; **1988 Senate Berne Hearings** at 507-508.

California

California was the first state to enact specific moral rights legislation, doing so in 1979. This Act, the California Art Preservation Act, codified in CAL. CIV. CODE Sec. 987, is limited to works of "fine art," defined as "an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, but ... not [a] work prepared under contract for commercial use by its purchaser." Architectural works are not within this protected class. [166]

Two principal acts are covered: (1) attribution (or disclaiming authorship for a just and valid reason) ; and, (2) mutilation, destruction, or alteration of a work, and grossly negligent framing, conservation, or restoration of a work. An exclusion is provided for fine art created under a work made for hire arrangement for use in "advertising, magazines, or other print and electronic media." There is, though, no provision on waiver, because it was thought that waiver would undercut the rights granted artists under the statute.

In 1982, the Act was amended to include a provision on removal of works of fine art from buildings. [167]

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166. Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., 205 Cal. Rptr. 620 (2d App. Div. 1984).

167. See generally, Gantz, Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform, 49 GEO. L. REV. 873 (1981); Karlen, Moral Rights in California, 19 S.D. L. REV. 675 (1982); Petrovich, Artists' statutory droit moral in California: A critical appraisal, 15 LOYOLA L. REV. 29 (1984); Note,

Connecticut

Passed in 1988, the Connecticut law extends protection to an incredibly detailed class of "works of the fine arts." Public Act No. 88-284:

> any drawing, painting, sculpture, mosaic, photograph, work of calligraphy, work of graphic art including any etching, lithograph, offset print, silkscreen or other work of graphic art; craft work in clay, textile, fiber, metal, plastic or other material; art work in mixed media, including any collage, assemblage or other work combining any of said media with other media; or a master from which copies of an artistic work can be made, such as a mold or photographic negative, with a market value of at least two thousand five hundred dollars; provided work of fine art shall not include (A) commissioned work prepared under contract for trade or advertising usage, provided the artist, prior to creating the work, has signed an agreement stating that said work shall be a commissioned work which may be altered without consent; (B) work prepared by an employee within the scope of his employment duties.

The artist is granted the right to claim authorship and, by implication, to prevent the intentional physical defacement or alteration of a work of fine art. These rights may not be waived "except by an instrument

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California Art Preservation Act: A safe hamlet for "moral rights" in the U.S., 14 U.C.D. L. Rev. 975 (1981); Francione, California Art Preservation and federal preemption by the 1976 Copyright Act - equivalence and actual conflict, 18 CAL. W.L. REV. 189 (1982); Note, The Americanization of Droit Moral in the California Art Preservation Act, 15 N.Y.U. J. INT'L L. & POLICY 244 (1983).

in writing expressly so providing which is signed by the artist." The term exists "until the fiftieth anniversary of the death of [the] artist."

Louisiana

In 1986, the Louisiana legislature enacted moral rights for works of "fine art," defined as "any original work of visual or graphic art of recognized quality in any medium which includes, but is not limited to, the following: painting, drawing, print, photographic print, or sculpture of a limited edition of no more than three hundred copies; however, 'work of fine art' shall not include sequential imagery such as motion pictures." LA. REV. STAT. 51:2152(7).

The specific rights granted are the right to claim or disclaim authorship and of the right of integrity (with respect to the public display and reproduction of works of fine art that have been "altered, defaced, mutilated, or modified."). Id. at Sec. 2153. Exceptions are made for alterations that are the result of the passage of time, the inherent nature of the materials, or conservation that is not negligent, and "work prepared under contract for advertising or trade use unless the contract so provides." Id. at Sec. 2155. The author may expressly agree to having his or her name omitted, id. at Sec. 2154, and appears to be able to "consent to" a public display of a defaced, mutilated or modified version of the work. Id. at Sec. 2153 (Preamble).

Maine

The Maine legislature granted limited moral rights of attribution (and disclaimer) and integrity in 1985, extending them to "any original work of visual or graphic medium which includes, but is not limited to, painting, drawing, print, photographic print or sculpture of a limited edition of no more than 300 copies. 'Work of fine art' does not include sequential imagery, such as that in motion pictures." **Title 27, Libraries, History, and Culture, ch. 303.1.D.**

Covered works are protected against public display, publication, and reproduction in an altered, defaced, mutilated or modified form when this "would reasonably be regarded as being the work of the artists, and damage to the artists' reputation is reasonably likely to result ... ." An exclusion is made for conservation that is not the result of gross negligence, and for works "prepared under contract for advertising use, unless the contract so provides."

Massachusetts

The Massachusetts legislature was also active in 1985, providing protection to "any original work of visual or graphic art of any media which shall include, but not be limited to, any painting, print, drawing, sculpture, craft object, photograph, audio or video tape, film, hologram, or any combination thereof, of recognized quality." **MASS. GEN. LAWS. CH. 110, Sec. 231-85S(b).**

Some commentators contend that the Act encompasses motion pictures. [168] Massachusetts has a broad exclusion, though, for works "created by an employee within the scope of his employment," id. at Sec. 85S(b), a category that would seemingly eliminate most of the creative participants in motion pictures.

New Jersey

New Jersey enacted protection in 1986. **Title 2A, Administration of Civil and Criminal Justice, ch. 42A, Artists' Rights.** The definition of "work of fine art" is copied verbatim from that of the Maine statute, supra, and thus excludes motion pictures.

New York

In 1983, New York passed the Artists' Authorship Rights Act, now codified in NY ARTS & CULTURAL AFFAIRS Secs. 14.01-14.03. The definition is the same as that adopted two years later by Maine, supra, and therefore excludes motion pictures.

In Newman v. Delmar Realty, **New York Law Journal**, June 11, 1984, an

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168. See Koven, Observations on the Massachusetts Art Preservation Act. **71 MASS. L. REV. 101, 106 (1986)**("By including film in the definition of fine art, the Massachusetts legislature may have bitten off more than the legal system can chew").

artist successfully prevented destruction of his mural. [169] Two claims under the statute, arising out of unauthorized reproductions of works of fine art have, however, been held preempted by the Copyright Act. [170]

Pennsylvania

In 1986, Pennsylvania passed a rather broadly phrased moral rights provision protecting "[a]n original work of visual or graphic art of recognized qualities created using any medium. The term shall include, but not be limited to, a painting, drawing, or sculpture." PA. STAT. ANN. title 73, Secs. 2101-2110. It is unclear whether this extends to motion pictures. [171]

Rhode Island

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[169]. For a discussion of this case, see Merryman & Elsen, **1 LAW, Ethics and the Visual Arts 169 (1987)**("Merryman & Elsen").

[170]. Tracy v. Skate Key, Inc., 9 USPQ 2d 155 (SDNY 1988); Ronald Litoff, Ltd. v. American Express Co., 621 F. Supp. 981 (SDNY 1985). A pendent claim for violation of the statute was presented in Serra v. U.S. General Services Administration, 667 F. Supp. 1042, 1052 (SDNY 1987), aff'd, ___F.2d ___(2d Cir. 1988), but was not decided after the court dismissed the federal claims. See also Update Art, Inc. v. Charnin, 110 F.R.D. 26 (SDNY 1986)(claim presented). For a decision under prior New York law, see Crimi v. Rutgers Presbyterian Church, 89 NYS2d 813 (NY Sup. Ct. 1949)(destruction of mural allowed). For discussions of the New York statute, see Damich, The New York Artists' Authorship Rights Act: A Comparative Critique, **84 COLUM. L. REV. 1733 (1984)**; Scott & Cohen, An Introduction to the New York Artists' Authorship Rights Act, **8 COLUM. J. ARTS & L. 369 (1984)**; Note, The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists, **70 CORN. L. REV. 158 (1984)**.

[171]. Cf. Meliodon v. Philadelphia School District, 328 Pa. 457, 195 A. 905 (1938)(alteration of sculpture permitted).

Also in 1987, Rhode Island passed moral rights legislation, defining the term "work of fine art" identically to that in the Maine, New Jersey, and New York statutes, i.e., excluding motion pictures. BUS. & PROF. ch. 62 Secs. 5-62-2 through 5-62-6.

FEDERAL LEGISLATIVE EFFORTS

Early Efforts to Adhere to the Berne Convention

Discussion of moral rights in the United States has been inextricably intertwined with the question of adherence to the Berne Convention, which was ratified in 1886, in Berne, Switzerland. The United States attended the final pre-ratification conference in that year as an observer only.

When the Convention was opened for revision in Paris in 1896, the U.S. again attended as an observer and again did not adhere. This same pattern repeated itself in the 1908 Berlin revision. The 1909 general revision of the United States copyright law did little to move the U.S. toward compatibility with the Berne standards, even though those standards did not, at that time, include moral rights.

Moral rights were included as minimum rights under the Berne Convention at the Rome revision of 1928. The 1908 Berlin text of Berne remained open, however, for adherence until August 31, 1931, and, on January 13, 1931, H.R. 12549, legislation to permit Berne adherence passed the House of Representatives. Eight days later, on January 21, 1931, President Hoover

transmitted the Berne treaty to the Senate for ratification, but Congress adjourned before the Senate acted on either the treaty or H.R. 12549.

On February 14, 1934, President Roosevelt sent the Rome text of the Convention to the Senate, which at that time was considering S. 1928, implementing legislation introduced by Senator Cutter. During hearings in 1934 on possible U.S. adherence to the Berne Convention, representatives of the motion picture companies raised objections to adherence, based in part on the Convention's moral rights provisions. [172] On Friday April 19, 1935, the Senate, by a unanimous vote, ratified the Berne Convention. The following Monday, the Senate unanimously moved to reconsider the vote and returned the treaty to the Executive Calendar to await action on implementing legislation, action which did not occur until 1988.

In 1940, Senator Albert introduced a bill to revise the Copyright Act, Section 5 of which provided:

> (1) Nothing in this Act, nor any election to have copyright under this Act, shall be deemed to alter or in any manner impair any legal or equitable right or remedy of an author under common law or statutory law other than this act, to claim the paternity of his work as well as the right to object to every deformation, mutilation, or other modification of the said work which may be prejudicial to his honor or reputation.
>
> (2) Nothing in this Act shall be deemed to limit or otherwise affect any present or future valid

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172. See statement of Edwin P. Kilroe in International Copyright Union: Hearings on S. 1298 before the Senate Foreign Relations Comm., 72d Cong., 1st Sess. 69-70 (1934)("A limitation on the right to change the plot, scenes, sequence, and descriptions of the characters in literary works would bring havoc to the film industry").

> contract or waiver in respect to the subject matter of subdivision (1) of this section.

The bill was not favorably acted upon.

Moral rights were touched upon briefly during the Senate's consideration of the Universal Copyright Convention. See Universal Copyright Convention: Report of the Senate Committee on Foreign Relations, S. Exec. Rep. No. 5, 83d Cong., 2d Sess. 3 (1954)(describing Berne's moral rights provisions as at variance with U.S. law).

The General Revision of the 1909 Copyright Act

In preparation for a complete revision of the outdated 1909 Copyright Act, the Copyright Office in the late 1950s and early 1960s commissioned a number of studies on issues that might have to be addressed in such a revision. Study No. 4, by William Strauss, completed in 1959, [173] reviewed moral rights. Unlike most of the other revision studies, the Strauss moral rights study did not list possible future legislative proposals. The Register of Copyrights' 1961 report on the general revision very briefly reviewed the concept of moral rights, concluding:

> In the United States the moral rights of authors have never been treated as aspects of copyright. But authors have been given much the same protection of personal rights under general principles of common law such as those relating to implied contracts,

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173. Strauss, The Moral Right of the Author, Copyright Office Study No. 4, 86th Cong., 1st Sess. 109 (1959)(Comm. Print).

unfair competition, misrepresentation, and defamation. [174]

No recommendation on inclusion of moral rights in the revision legislation was made, and the subject does not appear to have been discussed thereafter.

Post -1976 Copyright Act W.I.P.O. Consultations

In 1978, the general effective date for the 1976 Revision Act, the World Intellectual Property Organization (W.I.P.O.) convened a Group of Consultants to review recent copyright legislation in, among other countries, the U.S., with a view to analyzing compatibility with the Berne Convention.

In the Group of Consultants meeting, the topic of moral rights was discussed. Representatives of the Copyright Office explained that while the United States did not have moral rights as part of its statutory copyright law, moral rights type protection was available under Section 43(a) of the Lanham Act and various state causes of action. The Group of Consultants' position was that if the Copyright Office was comfortable in stating that this common law as it was developing was sufficient to permit the U.S. to join Berne, they would not second guess that judgment. [175]

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174. 1961 Report at 4.

175. Report of June 7, 1978 Group of Consultants' Meeting, Transcript of talk to Copyright Office Staff given by then General Counsel Jon Baumgarten, at 10-11.

Visual Artists Bills

Following passage of the 1976 Copyright Act, bills were introduced to extend to authors and artists, under the Copyright Act, rights of paternity and integrity. The first of these bills, H.R. 288, 96th Congress, 2d Sess., was introduced by Representative Drinan on January 15, 1979. This bill, the "Visual Artists Moral Rights Amendment of 1979," would have amended Section 113 of the Act to include for pictorial, graphic and sculptural works, the rights to "claim authorship of such work[s] and to object to any distortion, mutilation or other alteration thereof, and to enforce any other limitation recorded in the Copyright Office that would prevent prejudice to the author's honor and reputation." [176] No action was taken on the bill.

In the first session of the 97th Congress, Representative Frank introduced H.R. 2908, identical to Representative Drinan's bill H.R. 288. [177] No action was taken on H.R. 2908.

In the first session of the 98th Congress, Representative Frank reintroduced his bill as H.R. 1521. No action was taken on this bill.

In the second session of the 99th Congress, Representative Markey took over from Representative Frank as the House advocate of moral rights for visual artists, introducing H.R. 5772, a bill identical to that introduced by Senator Kennedy, S. 2796. [178] These bills were broader in

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176. See also Congressman Drinan's introductory floor statement. 125 CONG. REC. 164 (1979).

177. See 127 CONG. REC. H217 (daily ed. March 30, 1981).

178. See 132 CONG. REC. S12,185, September 9, 1986.

scope than the previous Frank and Drinan efforts, although somewhat narrower in subject matter, since they borrowed from certain of the state statutes by limiting protection to pictorial, graphic, and sculptural works of "recognized stature." Sec. 2(3). The bills covered both the right to claim authorship and the right of integrity, as well as introduced a provision for a droit de suite allowing artists to share in the increasing value of their works in subsequent sales. A "field hearing" on S.2796 was held in New York City on November 18, 1986. [179]

In 1987, during the 100th Congress, the Kennedy and Markey bills were reintroduced as S. 1619 and H.R. 3221. Hearings on S.1619 were held on December 3, 1987. [180] At the conclusion of the 100th Congress, these bills came close to being passed. S. 1619 was favorably reported out by the Senate Judiciary Committee, but failed to make it to the floor. H.R. 3221 was reported out by the Subcommittee, but was not reported out by the full Judiciary Committee.

The Berne Implementing Legislation

In 1983, efforts to obtain adequate and effective protection for U.S. works overseas were aided, for the first time, by tieing preferential

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179. See Visual Artists Rights Amendment of 1986, Hearing on S. 2796 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm., 99th Cong., 2d Sess. (1986).

180. See, Visual Artists Rights Act of 1987, Hearings on S.1619 before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm., 100th Cong., 1st Sess. (1987), and Hearings on H.R. 3221 held before the Subcommittee on June 9, 1988.

treatment for imports into the United States to the foreign country's protection of U.S. intellectual property. [181]

Delegations of U.S. government officials subsequently visited countries affected by this legislation and were, on a number of occasions, met with remarks to the effect that before the United States could insist on other countries reforming their laws, the United States should join the Berne Convention. This argument had particular force in countries that were members of Berne and with which the United States had no multi- or bilateral relations. [182] As a result of these discussions with representatives of foreign countries, initiatives were begun to study ways to amend our copyright law to permit Berne adherence.

One important initiative was taken by a group of private sector attorneys formed at request of the State Department and under the chairmanship of Irwin Karp, counsel for the Authors League of America. This group, called the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, provided preliminary and final reports on issues raised by possible U.S. adherence to Berne. Chapter VI of the final report concerned moral rights and stated a conclusion that:

> Given the substantial protection now available for

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181. See Caribbean Basin Economic Recovery Act, Act of Aug. 5, 1983, Pub. L. No. 98-67, 97 Stat. 384. In 1984, similar provisions were inserted into the International Trade and Investment Act of 1984. Act of Oct. 30, 1984, Pub. L. No. 98-573, 98 Stat. 3018.

182. See **1986 Senate Berne Hearings** at 10 (Arpad Bogsch, Director General of the World Intellectual Property Organization); **1988 Senate Berne Hearings** at 95 (United States Trade Representative Clayton Yeutter).

> the real equivalent of moral rights under statutory and common law in the U.S., the lack of uniformity in protection of other Berne nations, the absence of moral rights provisions in some of their copyright laws, and the reservation of control over remedies to each Berne country, the protection of moral rights in the United States is compatible with the Berne Convention. [183]

The Ad Hoc report acknowledged there are no explicit moral rights provisions in U.S. copyright law, but pointed to Sections 106(a)(2) and 115(a)(2) of the Copyright Act, Section 43(a) of the Lanham Act, state statutes, and state and federal decisions "protecting various rights equivalent to those granted in Article 6bis under state common law principles," including contract, unfair competition, tort, libel, and the rights of privacy/publicity. [184] The Ad Hoc Committee's conclusions were criticized by some commentators, [185] and, perhaps surprisingly, by both those seeking to preclude federal moral rights protection, [186] and, by those seeking greater federal moral rights protection. [187]

Hearings on Berne Implementing Legislation in the Senate

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183. **1986 Senate Berne Hearings** at 458.

184. Id. at 459, 462-466.

185. See Damich, Moral Rights in the United States and Article 6bis of the Berne Convention: A comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, **10 COLUM.-VLA LAW & ARTS 655 (1986).**

186. See statement of CPACT, **1988 Senate Berne Hearings** at 401-402.

187. See statement of Directors Guild of America, **1988 Senate Berne Hearings** at 518-521.

On May 16, 1985, under the chairmanship of Senator Charles McC. Mathias, Jr. of Maryland, the Subcommittee on Patents, Copyrights and Trademarks began hearings on possible Berne adherence by receiving testimony principally from government witnesses, but without introduction of a bill to implement legislation necessary to change U.S. law in ways to make it compatible with the Berne Convention standards.

The purpose of the hearings was to discover which provisions of U.S. law would need to be revised if adherence was felt desirable. The question of moral rights was only briefly raised. [188]

In preparation for a second day of hearings scheduled for April 15, 1986, the Copyright Office and the Senate subcommittee staff prepared a draft discussion bill and commentary. [189] Regarding moral rights, the draft proposed two alternatives:

> Alternative A:
>
> > This title does not afford to the owner of copyright in a work any greater or lesser

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188. See testimony of former Register of Copyrights Barbara Ringer, **1986 Senate Berne Hearings** at 44 ("We do [not] need a moral rights statute in order to adhere... ."); statement of Copyright Office, id. at 70-71 (noting Article 6bis, 92-95 (describing moral rights and concluding issue deserved further study).

189. The 1986 Senate Berne Hearings reproduce an earlier version of this discussion bill and commentary at pages 657-672. A longer version, not reproduced, was the version sent out to the interested parties. This version contains two alternatives on moral rights, as compared to the single proposal found on page 667 of the 1986 Senate Berne Hearings. Because the witnesses were responding to this more complete version, we have referred to it, rather than to the earlier one.

> moral rights than those afforded to works under the law, whether Title 17 or the common law or statutes of a state, in effect [insert date], as held applicable and construed by a court in an action brought under this title.

Alternative B:

> The author of a copyrighted work, even after the transfer of one or all of the exclusive rights, shall have the right to claim authorship of his or her work during the work's term of copyright.

The commentary on these proposals stated:

> We have proposed only a freezing of the law under T[itle] 17, intending to leave the further development, if any, of moral rights to state jurisprudence and to future legislation. Combined with the declaration concerning the non-self execution of the Convention, this provision would preclude the injection of Convention rules into federal copyright law, without Congressional enactment.
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> Alternative A attempts to establish a rule that moral rights are unavailable under U.S. copyright law, beyond what the copyright law itself specifically provides. Alternative B (which is, strictly speaking, a complement to Alternative A) is intended to deal with the possibility that, in light of acknowledgment that the right of paternity is not recognized at common law and will only be recognized at common law if the parties to a contract so provide, Congress might choose to enact the most direct element of moral rights: the right of paternity.
>
> We note, too, recent Congressional proposals for introduction of moral rights into title 17. Our recommendations in this exercise should not be taken as hostility toward moral rights in general. To the extent that implementing legislation for Berne adherence and consideration of moral rights legislation are on roughly parallel tracks, further options may reveal themselves.

The Subcommittee hearing on April 16, 1986 received testimony from representatives of the private sector, some of whom criticized the draft moral rights proposal as confusing and needlessly foreclosing judicial developments that might have occurred without reference to Berne adherence. 190

After the hearings, on June 18, 1986, President Reagan transmitted the Berne treaty to the Senate for its advice and consent. [191] On October 1, 1986, Senator Mathias introduced the first Berne implementation bill, S.2904.[192] In his floor statement introducing the bill, Senator Mathias tied together non self-execution of the Convention and moral rights, an association that became significant as the Berne implementing legislation worked its way through the 99th and 100th Congresses. [193] In reviewing moral rights, Senator Mathias stated: "The record of our hearings and the views of most specialists in copyright is that moral rights are substantially

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190. See **1986 Senate Berne Hearings** at 155-157, 163 (Irwin Karp); 168-171, 180-181 (Professor John M. Kernochan); 222-223, 351 (Association of American Publishers). Cf. id. at 230 (Motion Picture Association of America, indicating either alternative would be acceptable); 324-325 (United States Council for International Business, supporting adoption of a provision similar to Alternative B); 374-375, 400 (National Cable Television Association, objecting to any moral rights); 400-401 (CBS, expressing preference that existing law be unchanged); 418, 422-425 (Graphics Artists Guild of America, American Society of Magazine Photographers, supporting adherence based on existing law); 715 (Professor Paul Goldstein (same)).

191. **Senate Treaty Document No. 99-27, 99th Cong., 2d Sess. (June 20, 1986).**

192. 99th Cong., 2d Sess. (1986); **132 CONG. REC. S14508** (daily ed. Oct. 1, 1986).

193. See **123 CONG. REC.** at S2909.

available under U.S. law, although not integrated in the Copyright Act." [194] The bill's provision on non self-execution of the treaty (Sec.2(a)(2)) was intended to "preclude resort to article 6 bis as a basis for asserting entitlement to moral rights in any litigation, based upon any statute or rule of common law, to the extent that it is claimed that the Berne Convention confers greater rights than the statute or rule of law involved."[195] While the bill did not contain a freeze on moral rights (or indeed any reference to the subject at all), Senator Mathias urged the Congress to reexamine the issue once the U.S. joined the Berne Convention. [196]

The next hearings in the Senate raising moral rights issues concerned not Berne, but complaints by directors and others over the computer encoding ("colorization") of black and white motion pictures. On May 12, 1987, the Subcommittee on Technology and the Law of the Senate Judiciary Committee, chaired by Senator Patrick J. Leahy of Vermont, examined these complaints. [197]

Part of the background to the hearings involved the Copyright Office's August 20, 1986 Notice of Inquiry regarding claims to copyright in computer color encoded motion pictures and other audiovisual works. [198] The decision to accept, on a class basis, such claims, was not, however,

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194. Id.

195. Id.

196. Id.

197. Legal Issues that Arise when Color is Added to Films Originally Produced, Sold, and Distributed in Black and White, 100th Cong., 1st Sess. (1987).

198. 51 Fed. Reg. 32665.

issued until June 22, 1987, some six weeks after the Senate hearing. [199]

The witnesses at the May 12th Senate hearing consisted of two opposing panels on color encoding, as well as Professor Paul Goldstein of Stanford University. The first panel included four directors: Elliot Silverstein, Sydney Pollack, Woody Allen, and Milos Forman, and one actress, Ginger Rogers. The second panel included representatives of companies involved in the actual color encoding: Roger L. Mayer (President, Turner Entertainment Co.), Rob Word (Senior Vice President for Creative Affairs, Hal Roach Studios), and Buddy Young (President, Color Systems Technology, Inc.). A videotape of director John Huston advocating opposition to color encoding was played. Correspondence in opposition to color encoding was received from the National Society of Film Critics, American Federation of Television and Radio Artists, International Photographers Guild, Make-Up Artists and Hair Stylists Local 706, Screen Actors Guild, French movie authors and directors, the Costume Designers Guild, and a professor of law.

While the witnesses were passionate in their opposition to or support of colorization, the specific question of moral rights and their relationship to Berne adherence was not raised, nor did the directors propose a particular legislative solution to prevent colorization. Instead, the directors made a general request for Congressional "guidelines" to prohibit colorization and other alterations to motion pictures, arguing that copyright owners of motion pictures have a "custodial responsibility to pass on the works they hold for the next generation, unchanged and

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199. 52 Fed. Reg. 23443.

undistorted." [200]

The next day, Representative Gephardt introduced H.R. 2400, the "Film Integrity Act of 1987." [201] In his floor statement introducing the bill, Mr. Gephardt explained that the intent of the legislation was to "give the screenwriter and director of a film the right of consent for any alteration of their work. It leaves these artists with the right to decide whether the artistic integrity of their film is being violated." [202] Mr. Gephardt stated a "deep concern over the potential impact of technologies like colorization on America's film treasury," but asserted that the legislation "does not stand in the way of new advancements in film technology. It does not ban these changes. But it does restrain film editors and computer technicians who would distort the original intent of our films." [203]

H.R. 2400 sought to amend Title 17 by providing for a new Section 119, pursuant to which no published motion picture could be "materially altered" - - including color encoded -- without the written consent of the "artistic authors" of the work. "Artistic authors" were defined as the principal director and principal screenwriter. The right to consent to material alterations was assignable, but only to other "qualified authors." Finally, the new version of films materially altered without the consent of

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200. **Hearings** at 10 (statement of Elliot Silverstein). See also id. at 12: "We hope that we can persuade the Congress to draw a guideline in order to restrain some citizens who perceive moral responsibilities rather narrowly and solely in terms of their own economic interests."

201. 100th Cong., 1st Sess.

202. 133 CONG. REC. E1922 (daily ed. May 13, 1987).

203. Id.

the artistic authors would be ineligible for copyright protection. The term of the right was perpetual, in violation of Article I sec. 8 cl. 8 of the Constitution.

No companion bill to H.R. 2400 was ever introduced in the Senate; however, on May 29, 1987, approximately two weeks after the Senate's "colorization" hearing, Senator Leahy introduced S.1301, a bill to implement the Berne Convention. The approach to moral rights in S.1301 was the same as that taken by Senator Mathias in the 99th Congress with S.2942; i.e., no express reference to moral rights, coupled with clear language on the non self-execution of Berne.

In his floor statement introducing the bill, Senator Leahy indicated his agreement with those arguing that current U.S. law provided sufficient moral rights to comply with Article 6bis of Berne, and his belief that a moral rights provision would present a "contentious distraction from the effort to bring the United States into the Berne Convention." [204]

On December 18, 1987,. Senators Hatch and Thurmond introduced the Administration's Berne Implementation bill, S.1971. Unlike S.1301, S.1971 contained express references to moral rights. Section 2(a)(4) of S.1971 declared "title 17 of the United States Code does not provide an author with the right to be named as a work's author or to object to uses or changes to the work that would prejudice the author's reputation or honor." Section 2(b)(1) stated an intent of Congress that:

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[204]. 133 CONG. REC. S7371 (daily ed. May 29, 1987).

> any obligation of the United States to provide the author with the right to be named as a work's author or to object to uses or changes to the work as a consequence of adherence to the Berne Convention will be satisfied by United States law as it exists on the effective date of this Act whether such rights are recognized under any relevant provision of Federal or state statutes or the common law and such rights shall be neither enlarged nor diminished by this Act.

Section 3 stated that no provision of Berne (e.g., Article 6bis) would be directly enforceable and that, in essence, all actions for infringement were to be governed by Title 17.

In his floor statement introducing S.1971, Senator Hatch, like Senator Leahy, took note of legal scholarship finding the totality of existing U.S. law sufficient to comply with Article 6bis, [205] and added that he hoped adherence without alteration of existing law would "ensure that concerns about moral rights provisions of the treaty [are] fully unfounded." [206]

The Senate resumed hearings on Berne adherence two months later, on February 18, 1988, under the auspices of the Subcommittee on Patents, Copyrights and Trademarks, chaired by Senator Dennis DeConcini of Arizona. Testifying were Representative Robert W. Kastenmeier; the new Secretary of Commerce C. William Verity; Clayton Yeutter, the United States Trade Representative; Register of Copyrights Ralph Oman; and Irwin Karp, Esq.

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205. 133 CONG. REC. S18408 (daily ed. Dec. 18, 1988).

206. Id. at S18410. See also "Sectional Analysis" of the bill, and the statement of Secretary of Commerce Malcolm Baldrige, id. at S18412.

In opening remarks at the hearing, Senator Hatch indicated that "[t]he major question to be answered before the United States ratifies the Berne Convention ... deals with the moral rights required by article VI [sic] of the 1971 [Paris] text." [207] Senator Hatch noted that "the Reagan administration and a growing body of international legal scholarship find current federal and State law perfectly adequate for protection of an author's right to be acknowledged and for an author's right to object to a modification of artistic works." [208]

In his opening remarks, Senator Leahy noted the controversy on moral rights, [209] as did Representative Kastenmeier, the first witness. Recalling his floor statement in introducing H.R. 1623, Mr. Kastenmeier commented that after hearing from creators, producing employers, directors, artists, and others, he had:

> come to respect the view that the best course of action is to avoid statutory treatment of moral rights in the context of Berne. This conclusion rests in part on the political reality that legislation with a moral rights provision simply will not pass and, further, amendments to the Copyright Act are not mandated in order to secure U.S. adherence to Berne. This opinion is not based on any hostility to moral rights of authors. [210]

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207. **1988 Senate Berne Hearings** at 41.

208. Id.

209. Id. at 43.

210. Id. at 46. See also id. at 65-67, Statement of Representative Moorhead.

The next witness was Secretary of Commerce C. William Verity. Apparently aware of claims that corporate copyright owners were seeking adherence to Berne to combat international piracy while simultaneously attempting to evade perceived domestic disadvantages such as moral rights, [211] Secretary Verity stated business's concern that adherence to Berne with moral rights:

> could affect not only their commercial practices but their ability to insure that the product truly reflects their viewpoint. ... Executives can not ignore a perceived threat to established business practices that go to the heart of their enterprises. That is not "selfishness" in the usual sense. [212]

Secretary Verity also indicated that the Administration would oppose future attempts to incorporate moral rights into the Copyright Act, [213] although it must be noted that he could bind only the now-departed Reagan Administration.

Moral rights were also addressed by Commissioner of Patents and Trademarks Donald Quigg, who echoed the Administration's view that the "totality of current U.S. law, including Federal statutes, certain common law tort and contract rights, and some state statutes, provides sufficient protection for the rights of paternity and integrity to comply with the

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211. See the directors' testimony at the **1988 Senate Berne Hearings at 368**, describing this position as "more outlandish or blatant than any film fantasy" and as a "massive act of self service."

212. Id. at 75.

213. Id. at 77, 116, 125-126, 128-129.

Convention." [214]

Register of Copyrights Ralph Oman testified that the proposed bills "would not necessarily freeze moral rights, but they would state that U.S. law on the subject would not be changed, either by express language or by implication." The courts, the Register stated "would not go behind the language of the implementing legislation and current U.S. law in deciding what the rights of authors were under the copyright laws." [215]

In questioning Under Secretary of State for Economic Affairs Allen Wallis, Senator Hatch raised the question whether moral rights legislation would be unconstitutional as allegedly contrary to the goal of promoting the public good. After review by State Department legal advisors, the State Department concluded that the argument had little merit. [216]

The final, and only nongovernmental witness was attorney Irwin Karp, the Chairman of the Ad Hoc Committee. Mr. Karp spoke out against the possibility of freezing moral rights at their then current level in the United States. [217] Of particular interest was Mr. Karp's inclusion of a June 12, 1987 letter from W.I.P.O. Director General Arpad Bogsch:

> In my view, it is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6bis of

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214. Id. at 87. Cf. testimony of USTR Yeutter, id. at 116-117, 131.

215. Id. at 160-162. See also the Register's further discussion of the issue, id. at 138, 154, 168-177, 186-189, 203-204, 205-208.

216. Id. at 112-113.

217. Id. at 209; 221-225.

> the Berne Convention. The requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute but also by common law and other statutes. I believe that in the United States the common law and such statutes (Section 43(a) of the Lanham Act) contain the necessary law to fulfill any obligation for the United States under Article 6bis.
>
> There are several countries of the common law system, and among them the United Kingdom (that joined the Convention exactly 100 years ago) that are bound by the Berne Convention, including its Article 6bis, which have never had and do not have at the present time statutory provisions on moral rights. [218]

On March 1, 1988, Senator Hatch placed in the Congressional Record a proposed amendment to the Administration's Berne Implementation bill (S.1971).[219] Sen. Hatch explained that while he had previously believed provisions maintaining the status quo were adequate to take care of concerns about moral rights, certain scholars "continue to harbor concerns that these provisions are not adequate to do the job. These scholars make excellent arguments that the door could be left ajar for pressure at the Federal level to create an actual body of moral rights laws." [220] Senator Hatch's amendment was intended to "restate in stronger, sharper language, the

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218. Id. at 223. This same letter had earlier been presented to the House. **See House Berne Hearings** at 205.

But. cf. Chapter IV, clauses 73-85 of the U.K. Copyrights, Designs and Patents Act of 1988 (Royal Assent received on Nov. 15, 1988, effective Spring 1989) which contain extensive provisions on moral rights. Section 43 of the 1956 U.K. Copyright Act did, moreover, have an express provision protecting against false attribution of authorship.

219. **134 CONG. REC. S1670-1671** (daily ed. March 1, 1988).

220. Id. at S1670.

provisions of S. 1971 ... to make clear that there is, in fact, a distinction between the substantial analogs of moral rights under current American law and the European body of moral rights." [221]

The proposed language was confusing, however. One section would have declared that the U.S.'s obligations under Article 6bis of Berne are satisfied by "relevant provisions of Federal or State statutes or the common law." Another provided that independent of an author's economic rights, he or she would not be entitled "on or after the effective date of this Act to any moral rights under any Federal or State statutes or the common law." Yet a third section stated that rights equivalent to moral rights "shall not, on or after the effective date of this Act, be expanded or enlarged either by Federal or State statute or by judicial construction."

The final day of Senate hearings on Berne adherence was held on March 3, 1988, and was devoted to private sector witnesses, five of whom were from the motion picture industry: David Brown, representing the Motion Picture Association of America and the Zanuck/Brown Company; George Lucas, chairman of Lucasfilm Ltd.; Bo Goldman, on behalf of the Writers Guild of America; and, Steven Spielberg and Elliot Silverstein, on behalf of the Directors Guild of America.

The remaining witnesses also referred generally to moral rights in their testimony. [222] For this report, we will, understandably, focus on the

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221. Id.

222. See testimony of Kenneth W. Dam, Vice President Law and External Relations, IBM Corporation, and, especially, for rather strong statements in opposition to moral rights, the testimony of John Mack Carter on behalf of the American Society of Magazine Editors, Donald F. Kummerfeld, President of

testimony concerning the motion picture industry.

David Brown, representing the MPAA and his own production company, did not testify about moral rights, but he did subsequently address the issue in answers to written questions posed by Senator DeConcini. The first question asked for a reply to the directors' criticism of motion picture companies for the "practice of requiring artistic authors to give up any moral rights or copyrights to the financing corporation." [223] In response, Mr. Brown noted that "given the strength and status of their powerful union, the directors have gained through collective bargaining myriad moral rights type protection in their DGA agreement." [224] These rights include the right to have the director's name prominently displayed in performances, distributions and advertisements of the work. Mr. Brown added that the DGA agreement represents only the minimum level of rights:

> Many directors have individual contracts with studios that give them "moral rights" type protections that go well beyond those contained in the guild agreements. These rights include whether or not the film should be shown on commercial TV or released on videocassette. In some instances, these rights even include final "cut" -- the determination of the version to be released.
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> These numerous provisions in the DGA agreement and myriad employment contracts belie any assertion that the directors are somehow routinely forced by the producers to give up any "moral rights" type

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the Magazine Publishers of America, and the extensive testimony of the Coalition to Preserve the American Copyright Tradition.

223. 1988 Senate Berne Hearings at 367.

224. Id.

protections.

Mr. Brown also referred to the huge financial risks at stake in the motion picture industry, noting that "[t]he cost of producing a film to an MPAA member company is now $20 million dollars ... [with an additional] $9 million for advertising and print costs," and that two thirds of these films never recover their production costs. In light of this, he concluded "it is entirely reasonable for those who expend such enormous sums, with such a limited prospect of recovery, to have 'some say in how that project comes out.'" [225]

The directors testified in support of the principle of adherence to Berne, but bitterly complained about adherence without express provision of moral rights, challenging the view that the totality of existing law was sufficient to comply with the Convention's obligations. [226] The directors pointed out that:

> countries where national legislation provide [sic] for artists rights have not had their court dockets inundated with moral rights cases, or their intellectual property industries collapse, as our opponents contend would happen. France, a country known for the most developed national legislation regarding the protection of artists, has maintained high artistic quality without sacrifice of its business system. [227]

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225. Id.

226. See statement of George Lucas, id. at 487-488; testimony and statement of Steven Spielberg, id. at 502-503, 507-508; statement of DGA, id. at 516-524.

227. Id. at 521.

The directors did, however, recognize that the producing companies have legitimate interests in ensuring that the film be released in a commercially successful form. They accordingly agreed to limit the protection sought to the following:

> (1) "Moral rights" would entail no changes whatsoever in the production phase of movie-making. To insure this, we recommend that statutory language be crafted to clarify that moral rights would obtain only after theatrical release, the first paid, public exhibitions of a film following previews, trial runs, and festivals, all of which provide input leading to the final release version of the film.
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> (2) "Moral rights" would be alienable. This is in accord with traditional American contract law. Some of my colleagues, who have made film in black and white, have stated they would have no objection to their work being colored by a computer. The choice should rest with the film's creative authors - the principal director and principal screenwriter.
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> (3) The Guild seeks no alteration of the traditional employer/employee relationship that is characteristic of relations between producers and directors. As far as copyright ownership, the work-for-hire doctrine should remain expressly intact. Moral rights, not economic rights, would be provided the principal director and principal screenwriter.
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> (4) To emphasize that our concern is for the integrity of the artist's work and not for any economic reward offered for granting permission to alter a film after release, we propose that the Congress limit any compensation for such permission to $1. [228]

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[228] **1988 Senate Berne Hearings** at 522-523. Cf. statement of David Brown, disputing the "compromise" nature of these proposals, Comment #4, Motion Picture Association of America, at p.10.

Reliance on contract law was believed to be inadequate because moral rights "will be given [only] to the privileged and the powerful. ... That is like saying freedom of speech should be a contract, that it should be contract law." [229] In a related vein, the directors disputed the claim that they could obtain more than the right of consultation through collective bargaining, and questioned whether "as a labor union the DGA could seek to effect its contract rights which exceed the employer/employee period." [230]

On April 13, 1988, the Subcommittee marked up S.1301 and favorably reported it, as amended, to the full Judiciary Committee. One of the amendments to S.1301 was the addition of the following language in Section 3:

> (b) **CERTAIN RIGHTS NOT AFFECTED.**- Any right of an author of a work, whether claimed under Federal, State, or common law, to claim authorship of the work, or to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation, shall not be expanded or reduced by virtue of, or reliance upon, the provisions of the Berne Convention, the adherence of the United States thereto, or the satisfaction of United States obligations hereunder. [231]

On April 14th the Committee on the Judiciary, by voice vote,

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229. Testimony of George Lucas, id. at 532.

230. Testimony of Elliot Silverstein, id. at 533-534, which concluded the hearing and didn't allow sufficient time for follow-up questions.

231. S.1301 as amended on April 13, 1988 is reproduced in **S. Rep. No. 100-352, 100th Cong., 2d Sess. 30 (1988).**

unanimously ordered S. 1301, as amended, to be favorably reported. [232] In discussing moral rights, the report stated that the bill "together with the law as it exists on the date of enactment...satisfy U.S. obligations under Article 6bis and that no further rights or interests shall be recognized or created for that purpose." [233] The amended Section 3, cited above, was "intended to preserve the status quo" with respect to the rights of an author to claim authorship or his or her right to object to distortion. [234] Rejecting the "freeze" approach sought by the Hatch amendment, the Committee stated:

> The provisions are intended neither to reduce nor expand any rights that may now exist, nor to create any new rights under federal or state statutes or the common law. Consequently, neither the interpretation of, nor the decisions in, prior cases should be changed or affected in any way because of the provisions of this Act, the action of our adherence to the Berne convention, or our obligations under Berne. Courts should be as free to apply common law principles and to interpret statutory provisions, with respect to claims of paternity and the right of integrity as they would be in the absence of U.S. adherence to Berne. [235]

S. 1301 was not taken up on the floor of the Senate until October 5, 1988. Between April 14th and October 5, 1988 members and staff of the House and Senate subcommittees worked out a compromise implementation bill and

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232. S. Rep. No. 100-352, 100th Cong., 2d Sess. (1988).

233. Id. at 10.

234. Id.

235. Id.

were, therefore, able to avoid a conference. We shall return to the final version of the moral rights provisions in what became Public Law No. 100-568 after we review the hearings in the House.

Hearings on Berne Implementing Legislation in The House

Early in 1987, the Subcommittee formally began its deliberations on Berne adherence, with the introduction, on March 16th, of H.R.1623 by Chairman Kastenmeier. Representative Moorhead, the ranking minority member of the Subcommittee, co-sponsored the bill. Section 7 of H. R. 1623 would have amended Section 106 of the Copyright Act to provide a new Section 106, with language tracking that found in Article 6bis of the Berne Convention. A special provision limiting moral rights for works of architecture was included in a proposed Section 119. In his floor statement on H.R. 1623, the Chairman prefaced his discussion of moral rights by noting that "[t]here is no doubt that the Berne Convention requires recognition of these rights." The question, then, was "whether such rights exist with the degree of national uniformity and predictability which should be provided in order to fairly comply with Berne requirements." In remarks that were prescient, the Chairman concluded:

> While statesmanship and the spirit of political compromise may, in the final reckoning, work a different solution to the moral rights question, I am reluctant to reject at the outset the necessity of recognition of moral rights which may be of great interest to authors and artists, if not to those who

deal with their works. [236]

On July 6, 1987, Secretary of Commerce Malcolm Baldrige transmitted proposed Berne implementation legislation to Speaker of the House Jim Wright. In a letter accompanying the proposal, Secretary Baldrige explained that no provision was made for moral rights, because the Administration was "proceed[ing] on the principle that the totality of our law, including the common law of torts, provides protection at a level sufficient to comply with the convention's requirements." [237]

On July 15, 1987, Representative Moorhead, on behalf of the Administration, introduced the proposed implementing legislation as H.R. 2962. Unlike H.R. 1623, but in accordance with Secretary Baldrige's July 6 letter, H.R. 2962 contained no provision on moral rights. In his statement on introducing the bill, Mr. Moorhead indicated that "[t]he Administration bill proceeds from the assumption that the totality of U.S. Law, including the right to prepare derivative works under the Copyright Law, the Lanham Act's proscription of false designation of origin - section 43(a) - and common law rights of contract and tort - especially defamation and invasion of privacy - provide protection for the rights of paternity and integrity sufficient to comply with the Berne Convention." [238]

During the 100th Congress, six days of hearings were held in the

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236. 133 CONG. REC. 1293-1294 (daily ed. March 16, 1987).

237. See House Berne Hearings at 1230.

238. 133 CONG. REC. E2897 (daily ed. July 15, 1987).

Subcommittee on the question of U.S. adherence to Berne. Two of these days-- September 16 and 30, 1987 -- were devoted to the specific issue of moral rights.

In his opening remarks at the September 16th hearing, Chairman Kastenmeier reviewed the differences in approach to moral rights taken in H.R. 1623 and H.R. 2962, and stated that he "welcome[d] ... some diversity of statutory language so that we may fully explore this." [239] Mr. Moorhead stated both a belief that the differences could be worked out and a concern that if they were not, most likely, Berne adherence would not occur. [240]

The first witness was Peter Nolan, Vice President-Counsel, Walt Disney Productions, who appeared on behalf of the Motion Picture Association of America. After reviewing the benefits of Berne adherence, Mr. Nolan discussed moral rights, testifying that "[t]he members of the Motion Picture Association oppose in principle the establishment of any so-called moral rights laws." [241] The MPAA agreed, however, that current law satisfied the minimum requirements of Article 6bis, but wanted it made clear that any Berne adherence legislation "should include, as an absolutely critical element, provisions similar to those found in Congressman Moorhead's bill... ." [242]

The specific claims of the directors were not addressed, however,

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239. House Berne Hearings at 228.

240. Id. at 228-229.

241. House Berne Hearings at 233.

242. Id. at 233. See also id. at 234, 241-242, 283-288, 308-311.

either by Mr. Nolan or the other witnesses. [243]

The witnesses on September 30th included representatives of the Directors Guild of America and the Writers Guild of America, who testified at some length on their position that federal legislation providing for moral rights was necessary to protect against post-theatrical release alterations to motion pictures, including by colorization, time compression, and panning/scanning. [244] The specific proposals made for legislation were identical in substance to those presented to the Senate in March 1988, with the exception that the directors agreed Berne was not self-executing. [245] Representatives of companies doing computer color encoding and other alterations to motion pictures did not testify.

During a congressional recess in November 1987, a delegation of five members of the Subcommittee as well as staff travelled to Geneva, Switzerland and Paris, France for consultations with foreign copyright experts to receive their views on "whether the United States should join the Berne Convention, and if so what changes would be necessary in our current law." [246] In Paris, the members and staff met with, among others,

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243. See testimony of Kenneth W. Dam of the IBM Corporation, who noted that "in IBM's views, moral rights have not posed any serious problems for its business operations in foreign countries," id. at 283. See also id. at 308-331, and earlier remarks at 243-244, 249, 259-272, 283, as well as testimony of David Ladd, Esq. on behalf of the Coalition to Preserve the American Tradition and John Mack Carter (Magazine Publishers Association), id. at 331-371, 385-403 (opposing Berne adherence principally on moral rights issue).

244. See id at 405-538; 1243-1264.

245. See id at 422.

246. H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 9 (1988).

international film producers and directors. Predictably, the two groups had opposing views on the desirability of moral rights in the motion picture industry. [247]

A transcript of the Geneva consultations is reproduced in the **House Berne Hearings** at 1135-1217. The question of moral rights was raised and addressed by experts from Austria, England, the Federal Republic of Germany, France, Hungary, Israel, the Netherlands, Spain, and Sweden. [248]

The first commentator on the issue was Margaret Moeller, Ministerial Counsellor in the Federal Ministry of Justice, Federal Republic of Germany. Madame Moeller dismissed claims that moral rights would lead to decreased access to works, noting the "lively and vivid cultural industry" in Europe and the small number of moral rights cases that have been brought. In the motion picture field, there had, in West Germany, as of 1987, been only three moral right cases in the preceding forty years involving the motion picture industry, "two of which were settled by agreement of the parties and, in the last case, the [novelist] lost and the film industry won." [249]

Madame Moeller also cited a provision of West German law that limited moral rights in cinematographic works to situations where there are "gross distortions" or other "gross injuries," and even then, the owners of the moral rights "must take into account the respective legitimate interests of the other persons accorded this right as well as the legitimate interest of

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247. Id.

248. See **House Berne Hearings** at 1146-1147, 1151-1175.

249. **House Berne Hearings** at 1152.

the producer of the cinematographic work." [250] She stated a belief that this provision was of "great help" in protecting producer's economic interests. [251]

Mr. J.A. Ziegler of France spoke next and submitted a written statement. [252] In his statement, Mr. Ziegler addressed the question of moral rights and work made for hire:

> [W]ith regard to the United States in particular, my major concern is for the situation applicable to works made for hire, a highly important category of works in which authors are currently deprived of any moral right entitlement. This is doubtless a legal position which is incompatible with the protection provided for under Article 6bis of the Berne Convention. [253]

Dr. D.W. Feer Verkade of the Netherlands also spoke and submitted a written statement. [254] Professor Verkade primarily addressed the arguments against moral rights made by former Register of Copyright David Ladd on behalf of certain magazine publishers, rejecting the claim that moral rights have interfered with publishing, and criticizing Mr. Ladd for "ask[ing] too much from any legislature and ... not grant[ing] the trust that should be granted to competent courts." [255]

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250. Id. at 1153.

251. Id.

252. Id. at 1156-1158.

253. Id. at 1157.

254. Id. at 1160-1163.

255. Id. at 1160.

Hearings on H.R. 2400

On June 21, 1988, the Subcommittee held hearings on H.R. 2400, "The Film Integrity Act of 1987," introduced by Representative Gephardt. The witnesses were the Register of Copyrights Ralph Oman, director Arthur Hiller, New York Times film critic Vincent Canby, Monroe Price (Dean, Cardozo Law School), producer David Brown, and Roger Mayer (President and Chief Operating Officer Turner Entertainment Company).

Mr. Oman was the first witness. In his oral remarks, he focused on the proposals for a National Film Preservation Board, which at that time was proceeding, in a controversial manner, through the Interior Subcommittee. Mr. Oman noted that "[w]hatever title or characterization all of the bills and ideas may have, they are fundamentally about copyright or fundamentally affect the rights of authors and copyright owners, and it is this subcommittee that must subject them to careful scrutiny. No other forum has the accumulated experience in crafting balanced legislation." [256]

Turning to the specifics of those proposals, Mr. Oman stated that if there was to be a labelling requirement for motion pictures that have been altered subsequent to their theatrical exhibition, it was preferable for all such films to be labelled, and not just designated "classics." In reviewing the bill's limitation on the exercise of rights to the principal director and screenwriters, Mr. Oman noted that while material alterations "affect

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256. Unofficial Transcript at 10.

the contribution of directors and screenwriters," such alterations "very often have a profound impact on the work of cinematographers, editors, art directors, and even performers, to name just a few." [257]

In his written remarks, Mr. Oman elaborated the Copyright Office's position on H.R. 2400. Due the controversial nature of moral rights, and the importance of joining the Berne Convention under the "minimalist" approach, Mr. Oman stated the Copyright Office's opposition to any bill that explicitly accorded a high level of moral rights. The Register did, however, support further consideration of moral rights legislation after passage of the Berne implementing legislation.

Considering the provisions of H.R. 2400 independently of Berne adherence, Mr. Oman stated the Copyright Office's opposition to H.R. 2400 on technical grounds:

> The bill fails to establish a well-defined moral right of integrity, it may run afoul of the copyright clause in the United States Constitution, and its provisions regarding ownership, transfer, and other aspects of the right created are incomplete and raise interpretive questions.

Unlike Article 6bis of the Berne Convention, which limits the author's right to object to changes that are prejudicial to his or her honor or reputation, H.R. 2400 prohibited any unauthorized material alteration, regardless of whether it had a negative consequence for the integrity of the work. In a detailed passage, Mr. Oman reviewed the effect of such a broad

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257. Id. at 13.

approach:

> The overly broad prohibition would surely raise the marketing problems regarding the distribution of a motion picture in the United States and abroad. Traditionally, United States copyright law has afforded the copyright owner of a motion picture the following right regarding alteration of the work: the right of authorizing the cutting or editing of the film for theatrical exhibition, broadcast exhibition, airline use, home video distribution, and preparation of noncommercial educational study materials; the right of authorizing the addition of subtitles, dubbing, or the addition of music for foreign distribution; and the right of authorizing an adaptation of the work (the creation of a derivative work in another medium), a remake of the work, or a historic reconstruction of the work (i.e., to add footage or other material which the screenwriter or director arguably might have wanted in their version as published but which was excised by the producer prior to first release). However, H.R. 400 would require all these alterations of the motion picture, no matter how well intentioned and well done, to be cleared with the artistic authors of the work in addition to the copyright owners.
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> In addition to this interference with the ordinary marketing and distribution of motion pictures, the "material alteration" prohibition would interfere with, or perhaps eliminate completely, the exclusive right of the copyright owner -- such as novelizations -- based on the copyrighted work. A more narrowly drafted definition of the right of the artistic authors of a motion picture that focuses on the material alterations that mutilate, distort, or otherwise prejudice the integrity of the artistic authors would avoid this problem and would delineate the economic rights of copyright owners from the moral rights of the artistic authors. [258]

The next witnesses, comprising a panel supporting H.R. 2400 (or

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258. Statement at 26.

legislation supporting labelling of materially altered films) were director Arthur Hiller, representing the Directors Guild of America, Vincent Canby, film critic for The New York Times, and Monroe Price, Dean of the Cardozo School of Law.

Mr. Hiller testified first, stating that H.R. 2400 represented a "modest and restrained approach that balances the interests of the copyright holders with the interests of the creative artists and the larger societal interest of protecting our country's social heritage." [259]

In the question period, Chairman Kastenmeier asked Mr. Hiller about the proposed limitation on rights to only the principal director and principal screenwriter. Mr. Hiller's response was that the "writer provides the basis from which ... the rest of us work ... and the director ...is the only one who has the entire picture in his or her head." [260]. Mr. Lungren of California asked a series of questions about the need to introduce younger audiences to classic movies through colorized versions, given that most of them, he believed, will not watch the black and white version. In reply, Hiller expressed a concern that if "you keep the black and white and you show the colored version, that becomes psychologically in everyone's mind the version and the black and white doesn't exist even though it is somewhere away." [261]

Mrs. Schroeder of Colorado raised two concerns: (1) the utility of

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259. Unofficial transcript at 44.

260. Id. at 67.

261. Id. at 70. Cf. Mr. David Brown's response to the same line of questioning, id. at 132.

the proposed film commission; and, (2) whether producers and other financiers would put up the necessary capital for new films if the directors could prohibit exhibition on airlines and television. [262] Mr. Hiller testified that the directors regarded the film commission as only one step toward their goal, and that they understood the need to insert commercials and to edit for obscenity.[263]

Mr. Hyde of Illinois returned to the issues of editing for airlines and whether only the principal director and principal screenwriter should be the beneficiaries of the bill. [264] Mr. Berman of California then inquired into three critical areas: (1) whether reliance should be made on the collective bargaining process; (2) the nature of "material alterations;" and, (3) the rights of novelists and other authors of preexisting works to object to perceived material alteration of their works in motion pictures. [265]

In response to the first inquiry, Mr. Hiller testified that he did not know whether any of the issues regarding material alteration had been brought up in collective bargaining, but that regardless of this, "we are talking about ... a social issue, ... preservation of an art form. And that talks about our society as it is today and the society of the future, and I

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262. Id. at 75-81.

263. Id. at 81.

264. Id. at 82-86.

265. Id. at 87-92.

think that is beyond collective bargaining." [266]

Regarding the definition of "material alteration," it was established that cutting for commercials, dubbing in a foreign language, and inserting subtitles were not material alterations, but that colorization was. [267] Finally, on the question of the rights of novelists and others who works are used in motion pictures, Mr. Hiller stated, in essence, that they had been paid and accordingly had no further rights. Mr. Berman followed up by asking why that same rationale shouldn't be applied to directors. Mr. Hiller did not directly respond, but merely noted that the directors sought to bifurcate economic and moral rights.[268]

Mr. Cardin of Maryland then inquired whether labelling requirements, including a right of a director to insist upon removal of his or her name from a colorized motion picture, would satisfy the directors' concerns. [269] Mr. Hiller replied they would not.[270]

The next witness was Vincent Canby, who, in a brief opening statement, testified in favor of H.R. 2400 and against colorization. [271]

The final witness on the panel was Dean Monroe Price, who, while not

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266. Id. at 88. In earlier hearings, the Directors Guild had testified that these issues had been the subject of protracted negotiations. See **1988 Senate Berne Hearings** at 533.

267. Id. at 90.

268. Id. at 91-92.

269. Id. at 93-97. See also Mr. Lungren's follow up questions on this issue, id. at 98-99.

270. Id. at 95.

271. Id. at 49-52.

endorsing H.R. 2400, did testify in favor of the all films labelling approach raised by the Register of Copyrights in his testimony.

The final panel was comprised of David Brown, a film producer, and Roger Mayer, President and Chief Executive Officer of the Turner Entertainment Company. Mr. Brown began his testimony by emphasizing the role of the producer [272] and others, including creators of special effects, cinematographers, musicians, composers, lyricists, and animators. [273] In Mr. Brown's opinion, the marketplace, combined with collective bargaining, was the proper forum for resolving the directors' complaints, not moral rights legislation or a National Film Preservation Board. [274]

Mr. Mayer, concluding the panel, began by testifying that "today's audiences are conditioned to look at movies in color. They simply cannot be cajoled or bullied into watching them in black and white, and we have tried." [275] By colorizing black and white movies, Mr. Mayer stated that Turner had "revitalized interest and found an audience for them, and we can show that." [276] In any event, Mr. Mayer noted that the black and white

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272. Id. at 102-105

273. Id. at 106-107.

274. Id. at 108-109.

275. Id. at 112.

276. Id.

version of the film remains available for videocassette purchase or rental.[277] Rejecting the directors' approach to motion pictures, Mr. Mayer asserted that:

> This [is] really [not] a contest between art and commerce. These movies were made as entertainment in commercial ventures by production companies who assumed all the risk. Those who helped them took no financial risk and were paid, often handsomely. They did not return their salaries with an apology if the movie flopped. [278]

In his questioning of the witnesses, Chairman Kastenmeier inquired principally about possible objections to labelling requirements, and the proposals that directors and screenwriters be permitted, if they wished, to disassociate themselves from an altered version of the film. [279] Mr. Mayer replied that his company did not object to reinforcing credits, but opposed permitting directors and screenwriters to disassociate themselves from a colorized film, given the value of name associations to the exploitation of the film. [280]

Mr. Lungren then reviewed Turner's marketplace need for preservation and asked whether Turner had an objection to being required to retain a

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277. Id. at 113. See also id. at 116-117, for Mr. Mayer's testimony regarding Turner's preservation efforts and the use of profits from sales of colorized movies to fund these efforts.

278. Id. at 113-114.

279. Id. at 120-126; 141-146.

280. Id. at 125. See also Mr. Berman's questioning at 140-141.

black and white copy of a colorized film. Noting the Copyright Office's then proposed deposit regulation to such effect where a claim to copyright in a colorized motion picture is submitted, Mr. Mayer replied that Turner had no such objection. [281]

Mr. Berman began his questioning by asking the panel whether there were any recent changes in the film industry that might be motivating the directors' complaints. Mr. Brown replied that motion picture production begins today "the way it did in the ... first days of the motion picture industry. It begins with an idea and a story. ... So it begins with a producer who has a vision of what he wants to make, and he takes that to a company which may well be owned by a conglomerate and sells that idea. But the creative process is unaffected." [282] Mr. Brown expressed the belief that the directors' motivations were sincere, but that they were misinformed about the issues, noting, "there has always been a kind of class warfare among directors and producers, and writers and directors themselves. I don't know why this internecine struggle goes on. It is very bizarre."[283]

The hearing concluded with a series of questions by Mr. Berman and Chairman Kastenmeier on labelling.[284]

Initial House Passage of Berne Implementing Legislation

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281. Id. at 129.

282. Id. at 135-136.

283. Id. at 136.

284. Id. at 139-148.

On March 9, 1988, the Subcommittee marked up H.R. 1623. Following the approach outlined by Chairman Kastenmeier in his testimony before the Senate on February 18th, as marked up, H.R. 1623 deleted any express provision for moral rights. Berne was declared to be not self-executing. All of the United States' obligations under Berne were declared to be satisfied by and only enforceable pursuant to domestic law.

On March 28, 1988, a clean bill -- H.R. 4262 -- was introduced by Chairman Kastenmeier with twelve cosponsors. On April 28, 1988, the Committee on the Judiciary debated and then favorably reported out H.R. 4262 with two amendments, one of which related to moral rights. As reported out H.R. 4262 contained the following provision on moral rights:

> The adherence of the United States to the Berne Convention, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work - (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or, other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

The Committee's report, H.R. Rep. No. 100-609, 100th Cong., 2d Sess. (1988) contains an extensive (and invaluable) review of the moral rights issue, id. at 32-40, concluding that current U.S. law satisfies the requirements of Article 6bis. Id. at 38.

On May 10, 1988, the House, by a vote of 420-0 passed H.R. 4262 as reported out by the Judiciary Committee. In floor comments on the bill,

Chairman Kastenmeier noted his decision that:

> the best course was to avoid statutory treatment of moral rights in the context of Berne. This conclusion rested in part on the political reality that legislation with a moral rights provision simply would not pass. Furthermore, amendments to the Copyright Act relating to moral rights are not required in order to secure U.S. adherence to Berne.[285]

This view was shared by Mr. Moorhead in his remarks, who noted that he was "aware that the directors of motion pictures feel strongly that the use of colorization, panning and scanning, and time compression have impaired the integrity of the art of film making."[286] Mr. Berman, however, stated a concern with the bill's approach to moral rights:

> I am troubled, however, that we may not be intellectually honest when we conclude that we can join Berne by deeming U.S. laws to be in compliance, but assuming none of the responsibilities under the Convention to enhance the rights of authors.
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> ...
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> With regard to protecting films in particular from material alteration, the approaches to the issue which have been broached thus far by directors and screenwriters strike me as unworkable. We are not really solving any perceived problem if screenwriters and directors can effectively be coerced into waving the rights afforded by statute.
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> Those directors and screenwriters who are sufficiently prominent can achieve the rights in

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285. 134 CONG. REC. H3082-3083 (daily ed. May 10, 1988).

286. Id. at H3083.

> question through the vehicle of their contracts, and those who are not strong enough in their respective fields can easily be coerced into relinquishing those rights as a condition of being hired. I continue to have concerns on this point, and have not seen a statutory approach that addresses my concerns.
>
> At the same time, I am convinced that it is essential that those who put up the money and take the financial risk in making motion pictures be able to exploit those films in many markets. Getting American films made is in the interest of the entire creative community, and equally important, in the interest of the filmviewing public around the world.[287]

Mr. Fish of New York spoke next, and in favor of the approach to moral rights taken in the bill, [288], as did Chairman Rodino of New Jersey. [289] Mr. Lungren noted the complexity of the issue and expressed a hope that it would be revisited after Berne adherence. [290]

Senate Passage of the Berne Implementing Legislation

The Senate did not pass Berne implementing legislation until October 5, 1988; however, this legislation represented a compromise bill, worked out in advance by Members of both Houses and their staff. The provisions on moral rights were contained in Section 3(b) of the bill, which do not amend

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287. Id. at H3084.

288. Id.

289. Id. at H3085.

290. Id.

the Copyright Act, but instead represent "notes" to Title 17. [291]

> The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law -
>
> (1) to claim authorship of the work; or
>
> (2) object to any distortion, mutilation, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

Section 2 contains Congress's declarations that Berne is not self-executing and that the United States's obligations under Berne are satisfied and may be performed only under domestic law. In his floor statement on S.1301, [292] Senator Leahy noted his conviction that under the minimalist approach "no change in our law on artists' rights is needed to meet Berne standards." [293] Senator Leahy inserted into the Congressional Record a "Joint Explanatory Statement on Amendment to S. 1301," explaining the amendments made to S.1301 since it was reported out on April 14, 1988 by the Committee on the Judiciary. Moral rights were only briefly noted since S.1301's provisions on moral rights were "redrafted to conform to the

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291. See Section 2 and 3 of P.L. 100-568, 102 Stat. 2853, 100th Cong., 2d Sess. (1988)

292. In a parliamentary move, the text of the Senate passed S.1301 was passed as an amendment to H.R. 4262 in order to give the implementing legislation a House bill number. 134 CONG. REC. S14567.

293. Id. at S14551.

language adopted by the House without substantive change." [294]

Senator Hatch inserted an extended statement on moral rights endorsing the compromise, but adding:

> In the future there will no doubt be substantial efforts to expand moral rights in the United States. You can already see that beginning to happen with hearings that will be held in the other body later this month on colorization and moral rights for fine artists. While I continue to entertain some significant reservations about the concept of moral rights, the discussion will be wholly on the merits of this difficult policy question. [295]

Final Passage of the Implementing Legislation

On October 12, 1988, the House took up H.R. 4262 as passed by the Senate. Chairman Kastenmeier and Representative Moorhead inserted into the Congressional Record their "Joint Explanatory Statement on House-Senate Compromise Incorporated in Senate Amendment to H.R. 4262 (Berne Implementation Act of 1988)." This statement merely noted the previous drafting differences between the House and Senate approaches. No other references to moral rights were made.

On October 31, 1988, in Beverly Hills, California, President Reagan signed H.R. 4262 into law as P.L. 100-568. It became effective on March 1, 1989 with United States adherence to the Berne Convention.

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294. Id. at S14555.

295. Id. at S14557.

The Directors' Claims for Moral Rights

In their testimony before Congress, and in submissions to the Copyright Office and the Patent and Trademark Office, the Directors Guild of America (DGA) has argued that new federal moral rights legislation is necessary to control certain "material alterations" to theatrical motion pictures. The purpose of these rights is twofold: (1) to prohibit alteration of directors' work without their permission; and, (2) to make possible, for the benefit of society, the preservation of our nation's theatrical film heritage. Because only approximately 5 percent of the directors have sufficient bargaining power to contractually obtain such power, and their conviction that larger societal interests are at stake, the directors reject collective and individual bargaining as a realistic means of protecting artists' rights and those of the public.

While the point at which these rights would attach is fairly clear, [296] the form and scope of those rights is not. In his opening remarks to the Copyright Office at its September 8, 1988 hearing, Arnold Lutzker, Esq., representing the DGA, testified "[i]n the simple statement of Article 6bis [of the Berne Convention] lies the potential for

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[296]. Although formulated in slightly different ways, the point at which the directors wish the rights to attach is after the "theatrical release." See Transcript of Copyright Office Hearing at 125-126; DGA submission to the Patent and Trademark Office, Docket No. 80743-8143 at p.6 ("the theatrical release or the first paid exhibition of the film following previews, trial runs, and festivals... ;" **House Berne Hearings** at 422; **1988 Senate Berne Hearings** at 522-523.

protection," [297] adding:

> The National Film Preservation Board ... is but a modest beginning [but] [i]t in no way satisfies the concern of the directors of the films. Only the clearest statement that faithful adherence to the Berne principles of moral rights, and the entitlement of the principal director and principal screenwriter to prevent material alteration of the film without their consent will sufficiently answer their plea. [298]

Later, during questioning, Mr. Lutzker testified that either Representative Gephardt's H.R. 2400 or Chairman Kastenmeier's initial Berne Implementation bill, H.R. 1623:

> express[] as far as the film community -- film director is concerned -- the parameters of the type of legislation they would like to see. There can be changes in that. That would be the general framework. [299]

Beyond prohibiting colorization, the scope of these moral rights is unclear, perhaps necessarily so. In response to a question from Copyright Office General Counsel Dorothy Schrader, Mr. Lutzker testified that:

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297. Transcript at 107.

298. Id. at 111.

299. Id. at 135. In its submission to the Patent and Trademark Office, the DGA also called for amendments to Section 43 and 45 of the Lanham Act to prohibit defined "material alterations."

> [P]anning and scanning ... also has some problems. Time compression ... - the example with the closing scene from "Casablanca." The changes that are made in the pauses and the like, constitute things that they feel are materially - potentially materially-changing the integrity of the film. [300]

Ms. Schrader then followed up by asking:

> Are you saying then that every colorized film is objectionable - that every act of panning and scanning is objectionable? You are not really saying the alteration has to be material?
>
> MR. LUTZKER: No. Material is a word which the courts do grapple with in various degrees. The incidental use of panning and scanning may not be material. Colorization is something which is done to the entire work of art, and that's a little different
>
> MS. SCHRADER: You are using "material" in the sense of the quantity of the film that has changed?
>
> MR. LUTZKER: I mean there are examples -- yes... [Y]ou can quantify materiality in some respects. There may be other standards that may need to be - a simple pan and scan may not necessarily be material with respect to a particular film. [301]

Mr. Lutzker also agreed, however, that directors have contractually permitted panning and scanning to go on for over 20 years and that "would

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300. Id. at 133-134.

301. Id. at 134-135.

obviously be a factor that would have to be dealt with." [302]

The duration of the proposed moral rights is also unclear. H.R. 2400 had a perpetual term, in violation of Article I sec. 8 clause 8 of the U.S. Constitution. Mr. Lutzker testified before the Copyright Office that the directors "would like as long a period as would be legally appropriate. To say forever less a day might satisfy them, might be subject to go on forever. ... I think they are certainly looking to some distance in the future, minimally the term of copyright which is 75 years." [303]

Directors clearly wish these rights to apply to existing works, including those in the public domain. [304] They also wish the rights to be vested only in the principal director and principal screenwriter, [305] and without regard to the employer's ownership of economic rights. [306] Authors of preexisting works used in motion pictures, such as novels and musical compositions, would not be accorded moral rights with respect to material alterations of their works in the motion picture, but would instead have to rely on contractual provisions. [307]

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302. Id. at 130. Nevertheless, in their submission to the Patent and Trademark Office, the DGA proposed that "any change in a motion picture by virtue of ... process[es], including but not limited to colorization, panning and scanning, time compression and extensive editing for noncontinuity acceptance purposes" would be prohibited under the Lanham Act. Statement at 5 (emphasis added).

303. Id. at 132.

304. DGA Statement to the Patent and Trademark Office at 6-7; Transcript of Copyright Office Hearing at 130.

305. See H.R. 2400; Transcript of Copyright Office hearing at 121-122.

306. DGA Statement to Copyright Office in connection with this inquiry, Comment #8 at Tab I.

307. Id. at 121-122.

The Producer's Response

The producers' [308] response to the director's claims rests on the assertion that their activities are consistent with the purposes of the Copyright Act and the rights they have fairly obtained through collective and individual bargaining. Additionally, they argue that imposition of restrictions on existing works would violate the "takings" clause of the Fifth Amendment. The producers reject the directors' attempts to invoke a societal interest, arguing that "the only interests [being] advanced [are] private, not public -- the arbitrary aesthetic desires of a handful of individuals who in most cases had no hand in the making of the [particular] films [at issue]..." [309]

Specifically, the producers assert that colorization performs a valuable public service by bringing before the public works that would not otherwise have an opportunity to be viewed. They note that 96 percent of the public has color television sets and that 95 percent of the programs on television are in color, leading to a great resistance to black and white programming on the networks and the public:

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308. For simplicity's sake, the term "producer" is being applied here loosely to include not only those who produced the original theatrical form of the motion picture, but also to studios, distributors, and those who, like the Turner Entertainment Company, have purchased rights from producers.

309. Comment #4, Statement of the Turner Entertainment Company at p. 31.

> [I]t's not that there are no black and white programs available. It's just that the stations refuse to buy them; because as I said, it's a very commercial enterprise. They have their viewers, and they want as many of them as they can. They just don't get them in black and white. [310]

The producers further argue that by restoring the black and white version of motion pictures and making them available in videocassette form along with the colorized version, they are furthering the purposes of the Copyright Act by providing the public access to works of authorship. [311] The increased revenues derived from colorization also provide necessary funds for preservation. The Turner Company notes that from 1976 to 1986, approximately $30 million was spent to "maintain the film elements in its library and to transfer to safety film those materials produced before 1950." [312]

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310. Testimony of Rob Word, Quintex Corporation before the Copyright Office, Sept. 8, 1988, Transcript at 15. See also testimony of Roger Mayer before the Subcommittee at its June 21, 1988 hearing on H.R. 2400, Unofficial Transcript at 112: "[t]oday's audiences are conditioned to look at movies in color. They simply cannot be persuaded, cajoled or bullied into watching them in black and white, and we have tried;" id. at 69-70 (remarks of Rep. Lungren); and, Comment #4, Statement of Turner Broadcasting Company at pp. 7-8 (noting audience support for colorized versions).

311. See Comment #4, Statement of Turner Broadcasting Company at 9. The producers also argue that those members of the public who do not wish to view a colorized version of a work may simply turn off the color on their television set. Not all television sets have such knobs, however. Furthermore, contradictory evidence was presented regarding whether the black and white "version" of the motion picture resulting from turning the color off in this manner is the same as from a noncolorized black and white copy, due to a difference in the grey scale contrast. Of course, even black and white copies that have never been colorized vary greatly in the quality of this contrast.

312. Comment #4 at p. 13.

Due to the fact that almost two thirds of the motion pictures made by Motion Picture Association members lose money, [313] motion pictures must be delivered to the public in a wide variety of nontheatrical markets, and must be "adapted to meet the particular needs of each of these delivery systems."[314] The form of these adaptations has been the subject of intense, protracted collective bargaining, [315] through which the DGA has achieved some of its goals. Moreover, individual directors with proven track records and bargaining leverage have obtained some of these goals -- in particular, significant control over the form of post-theatrical distribution of their works. Legislation mandating such control for all directors will, the producers assert, result in a reduction in opportunities for young directors.

In short, the producers argue that the marketplace is the best forum to resolve the issues.

Copyright Office Analysis

In a 1985 article on the Semiconductor Chip Protection Act of 1984, Chairman Kastenmeier and Subcommittee Chief Counsel Michael Remington wrote

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313. We noted in Chapter 2 that it has been estimated that only 10% of a film's total audience views the work in the theatre: of the remaining 90%, 20% see it on videocassette or cable television, while 70% view it on free broadcast television.

314. Comment #5, Statement of Motion Picture Association of America at pp. 2-3.

315. See Chapter 4, supra.

that "the proponents of change should have the burden of showing that a meritorious public purpose is served by the proposed congressional action."[316] If that showing is made, Congress is then faced with "the delicate job of bartering between what are often contrary interests." [317]

The directors premise their arguments in satisfaction of the first threshhold -- a meritorious public purpose -- on the assertion that promoting enduring works of art for society's benefit is best achieved by giving to artists rights to prevent, without consent, alterations to their works in a manner that injures their reputation; and, that society has a special interest in ensuring that motion pictures are preserved in their original, unaltered form. Colorization, and at least certain types of panning/scanning, and time compression or expansion, they argue, injure the creators' reputations, give the public a distorted view of their work, and may displace the ready availability of the original works upon which they are based.

In Chapter 3, we analyzed these technologies, how they are applied to theatrically released motion pictures, and how they affect the aesthetics of the work. We concluded that colorization does impact on the aesthetics of black and white motion pictures by replacing the original aesthetic. As regards panning/scanning, we noted that there has been considerable improvement in the technique and that directors and cinematographers have avoided the need for intrusive panning/scanning by shooting within the "safe

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316. 70 MINN. L. REV. 417, 440 (1985).

317. Id. at 467.

action area;" viz., an area that roughly corresponds to the available composition space on a television screen. Regarding lexiconning (time compression or expansion), given the presence of some egregious examples, we concluded that it can adversely affect the aesthetics of theatrical motion pictures, and that the creative participants of the theatrical version cannot, at the time that version is shot, protect the film against subsequent lexiconning. We also stated, however, that no information was presented about the extent of lexiconning, nor do we have any idea how often it results in noticeably adverse effects.

In Chapter 4, we reviewed the impact of collective and individual bargaining on the development and distribution of motion pictures. We noted that the technologies at issue have been the subject of protracted collective bargaining through which the DGA has achieved some, but certainly not all, of its goals, including, importantly, the absolute right to control the material alteration of theatrically released motion pictures for non-theatrical markets. It has been estimated that only approximately 5 percent of the directors can achieve such rights in individual bargaining. We also observed that in 1960 the DGA and three other principal motion picture industry guilds gave up the collective right to compensation for pre-1960 theatrical motion pictures shown on network television in return for a cash settlement to be applied to a newly established pension fund.

With U.S. adherence to the Berne Union, we have accepted the

existence of moral rights. [318] Accordingly, to the extent that the particular technologies at issue here alter the aesthetics of motion pictures in a manner that injures the honor or reputation of directors and other creative participants in the motion picture, [319] the prevention of such injury serves, at least abstractly, a recognized "meritorious public purpose."

The director's invocation of the public interest may, however, require more careful thought. The root of such confusion is, perhaps, best revealed in the following colloquy that occurred at the Copyright Office's September 8, 1988 hearing:

> MR. PATRY [COPYRIGHT OFFICE]: The DGA wants to have final say in alterations -- material alterations- because its members believe they are in the best position to protect the aesthetic value of the film; is that correct?
>
> MR. LUTZKER [DGA COUNSEL]: Yes.
>
> MR. PATRY: But the DGA doesn't mind if individual directors permit their films to be materially altered: is that correct?
> MR. LUTZKER: Yes.
>
> MR. PATRY: ... Now, my question is this: Since that's true, the desire that we are really talking about -- of preserving the original aesthetic value of the film -- is not for the public, at all. If the public objects -- let's say that an individual director permitted his or her film to be mutilated, and the public objected and said, "We wanted to see

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318. Whether such rights, in whatever form, should be codified in a unified federal statute is a different question, and is addressed in Chapter 7 below.

319. See Article 6bis of the Paris text of the Berne Convention.

> this film in its original form," then the DGA would basically say tough luck?
>
> MR. LUTZKER: ... The bottom line answer is yes. If a film director agrees that this is the way the film should be, that is the way the film should be. It is to an extent the dictatorship of the creator. [320]

Given this attitude, and very recent public statements by directors that they are not opposed to material alterations per se, Congress may well ask whether the interest for which protection is sought is, in fact, purely personal. If so, it may then be asked why the directors should not rely exclusively upon collective and individual bargaining.

An additional significant factor in analyzing the public interest (at least with respect to videocassettes of colorized films and videocassettes issued in letterboxed form) is that the public is provided with both the original form of the work and the altered version, and is thereby afforded the opportunity to choose between them. Under the approach advocated by the directors, the public would be deprived of this choice. Contrary to the directors' claim, under such circumstances, Congress may well doubt that a dictatorship of the directors serves a meritorious public purpose.

Assuming the directors can satisfy the first threshhold set forth by Chairman Kastenmeier and Chief Counsel Remington, a "delicate job of bartering between contrary interests" is then necessary. Moreover, any legislation would have to pass constitutional muster. A new federal moral

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320. Transcript at 119-120. See also testimony of Steven Spielberg, **1988 Senate Berne Hearings** at 503 ("[t]he public has no right to vote on whether a black-and-white film is to be colored... ."); cf. statement of George Lucas, id. at 488 ("[t]he public's interest is ultimately dominant over all other interests.").

right affecting preexisting works, the copyright [321] of which is owned by individuals other than the beneficiary of the new right, raises serious constitutional issues under the "takings" clause of the Constitution. For this reason, if new federal moral rights are granted in the motion picture industry, Congress may find it advisable to draw a clear distinction between works in which copyright subsists prior to enactment, and those works created on or after enactment, with the rights granted only to the latter category of works.

The elimination of new federal moral rights for pre-enactment works may have the result of calling into question the need for any legislation, since very few motion pictures are now created in black and white, and those that are will probably be created by directors with sufficient individual bargaining leverage to prohibit colorization. Additionally, since most theatrical motion pictures in the last twenty-five years have been shot in the television "safe action area" to avoid extensive panning and scanning, legislation may be unnecessary for this technology.

If Congress concludes legislation is desirable to protect future motion pictures from material alterations, there is a wide array of interests that must also be protected, or at least considered. These interests include:

(1) Producers, studios, and others financing motion pictures. Any new right should not inhibit the

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321. With respect to works in the public domain, no Fifth Amendment rights are raised; however, an entire set of new constitutional issues are raised.

creation of new motion pictures;

(2) Broadcasters, cable systems and video retailers. Since the vast majority of the public views theatrical motion pictures on television screens, those who deliver motion pictures to this market serve a critical public purpose that must be protected;

3) Other creative collaborators. This group includes cinematographers, art directors, editors, and actors[322]. We appreciate the directors' role as the single unifying force in the actual shooting of theatrical motion pictures; however, in insisting that only the principal director and principal screenwriter be accorded moral rights, we conclude that these other creators' contributions are being unfairly disregarded, in what is quintessentially a collaborative effort. It is one thing to be in charge; it is quite another thing to say that because you are in charge you are the only person entitled to any rights;[323]

(4) Authors of preexisting works. This group includes novelists, short story writers, composers, and others whose existing works are later incorporated into motion pictures. Directors have argued that these authors should have to rely on contractual protections for material alterations to their works in motion pictures. This position is fundamentally at odds with the directors' argument that they should not have to rely on contractual protections in their dealings with producers. The directors' assertion that the motion picture represents a different medium misses the whole point of moral rights: all artists should have the right to protect the integrity of their works. We fail to see how a material alteration in a different medium that injures the author's reputation is any the less worthy of protection. We find support for this

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322. The copyright status of actors' and actresses'contributions is a difficult one that needs to be carefully examined.

323. We are aware that actors and actresses have expressed a willingness to place their rights in the "trust" of the directors. This is a fact Congress should consider should it find legislation desirable.

> proposition in the way many Berne member countries, including France [324] and Italy [325], assimilate authors of preexisting works as co-authors of the motion picture, for economic and moral rights purposes. We also note a certain irony in the directors' reliance on France and Italy's treatment of unauthorized colorization as a violation of the author's moral rights, but their apparent unwillingness to accept the full consequences of those laws - the grant of moral rights to authors of preexisting works used in motion pictures.

CONCLUSION

Any congressional decision to accord new federal moral rights in the motion picture industry should take into account the strong interests of producers, studios, distributors, authors of preexisting works, broadcasters, video retailers, and consumers. The directors' claim for such a moral right is not without merit, but, as currently proposed, it is subject to criticism on a number of grounds.

First, except as applied to the works of other directors from Hollywood's "Golden Era," invocation of the public interest by directors gives rise to a degree of ambiguity, since they do not strictly speaking seek to preserve the original version of motion pictures, but instead seek to obtain rights for individual directors to decide whether the theatrical version should be materially altered. Moreover, they also wish to deprive the public of the right to choose between the original unaltered version of

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324. See Article 14 of the French Copyright Act.

325. See Article 44 of the Italian Copyright Law.

the work and the altered version, where both are available. While the creation of motion pictures is not a democratic process, the decision to grant new moral rights is, a point the directors seemingly fail to appreciate.

Second, by proposing to vest the proposed higher levels of moral rights only in the principal director and principal screenwriter, the directors are unfairly disregarding the contributions of other artists, including cinematographers, art directors, editors, and actors and actresses.

Finally, the directors' argument that authors of preexisting works used in motion pictures should rely on contractual protections for material alterations to their works, is fundamentally at odds with their assertion that <u>they</u> should not have to rely on contractual protections in their dealings with producers.

CHAPTER 6: FILM PRESERVATION

Film preservation is not directly related to copyright, nor is the federal government generally required to preserve works of authorship or art in its custody. Likewise, copyright owners are under no duty to preserve works they own. The fact that responsible individuals as well as corporations and public archives, in particular the Library of Congress, strive to preserve motion pictures is noteworthy, especially given ever increasing costs. Preservation is important because of the decreasing number of original, unaltered works.

Film preservation [326] and restoration is extremely expensive and time-consuming. It is, however, an important undertaking, for only half of the more than 21,000 feature-length films produced in the United States before 1951 exist today. [327] The remainder have been lost, destroyed or allowed to deteriorate beyond repair. Most of the deterioration results

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326. Film archivists regard "preservation" as activities needed to retain, and properly store the original negative, and a fine grain master positive or interpositive. These "preprint" materials are different from the print materials retained by private companies.

327. Report of the American Film Institute: Twenty Years of Preserving, Nuturing and Celebrating America's Art Form, 1987, page 18. For newsreels, documentaries and television programs, the AFI estimates that the "survival rate" is less than half.

It is also estimated that there is a total of 16,000 black and white (monochrome) feature films and 22,000 hours of black and white television tape in the vaults of the studios in Hollywood. **The Wall Street Journal**, September 11, 1984, page 37, column 3.

from the use, until 1950, of unstable nitrate-based film stock.

The Turner Broadcasting System, Inc. provided us with a detailed description of the methods they employ to save old films, and the problems they encounter:

> Before 1950, almost all professional motion pictures were produced and duplicated on film that used a mixture of cellulose nitrate and camphor. Although this type of film is very durable in heavy use and easy to splice, it is also highly flammable and has a limited life span. Once ignited, a roll of nitrate film is impossible to extinguish, even by submersion in water.
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> A nitrate-based film passes through five stages of deterioration. These stages include fading and discoloration, stickiness, appearance of bubbles, spread of bubbles and brown froth, and finally, deterioration into brown powder. During the deterioration process, the film itself releases gases with nitrogen and oxygen compounds which attack the film's image and base.
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> Restoring discolored black and white films is possible if the discoloration is not too far advanced. The silver image may be bleached in an oxidizing bath of potassium hexacyanoferrate (III) and the image may be brought out through use of a fast developer. Films at a more advanced stage of discoloration, however, cannot be completely restored. Images will contain a reddish or brownish tint after the restoration process is completed. Film material that has been irreparably damaged is worthless and must be destroyed immediately. Nitrate based films can be restored through the first three stages of deterioration, but during the last two stages the film can no longer be repaired.
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> Acetate films are much more stable than nitrate-based film, since the acetic acid is not flammable. The process of preparing a nitrate film for copying onto an acetate-based film, however, is slow and expensive. First, to preserve a nitrate-based film until it may be transferred to an acetate safety

> film, the process of deterioration must be retarded. The films must be stored at temperatures that do not exceed 6 degrees centigrade or 42.8 degrees Fahrenheit. The humidity level must be carefully monitored since excessive moisture stimulates the production of damaging nitrate gases and accelerates the disintegration process. If the atmosphere is too dry, however, the film will shrink and become brittle. It is difficult to create storage conditions that retard deterioration yet do not produce shrinkage or brittleness. Because of the possibility of explosion, nitrate films cannot be stored in buildings that are used for living or working quarters.
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> Transferring the film from nitrate to acetate is time-consuming. The films must first be examined foot by foot on a rewind table. If there are any splices or defects in the film, it must be respliced and repaired so that the nitrate film can run smoothly through the printer. The film is copied at a speed slow enough to make a clear image on the acetate copy. It may require printing at speeds as low as ten or twenty feet per minute.
>
> Although acetate-based films are much safer than nitrate films, they too require extensive care in storage. If the storage area is too dry, the plasticiser will escape and eventually cause the film to shrink and crack. At that point, it is no longer possible to project the film. Excessive humidity, on the other hand, will also damage the film. [328]

The cost of restoring a single black and white film print typically exceeds $12,000; the cost of restoring a color film print more than $30,000. These costs can, however, exceed $100,000, as the recent restoration of "Lawrence of Arabia" demonstrates. Private sector restoration efforts are generally undertaken with the hope that the cost may

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328. Comment # 4 at 11-12.

be recouped through exploitation of the restored work. Some of the most extensive private sector restoration efforts have been those of the Turner Entertainment Company. Turner is the owner of one of the largest private film libraries, consisting of over 3,000 titles, including the MGM library (2200 features), the pre-1948 Warner Brothers library (750 films), and the RKO film library (700 features). From 1976 until 1986, MGM (now owned by Turner Entertainment Company) spent $30 million to maintain film elements in its library and to transfer to safety film those material produced before 1950. In the past two years, Turner Entertainment Company has spent $2.8 million in restoration and preservation of its library. Turner predicts a "chilling effect" on current private film restoration activities if Congress restricts its rights to exploit the restored works.

One important method of exploitation used to recoup restoration expenses is computer color encoding. The Turner Company has indicated that the opportunity to distribute colorized films has provided a great economic incentive for restoration. Turner's colorization activities are a byproduct of its efforts to restore the films in its extraordinarily valuable collection.

Many of the films now being colorized had little or no commercial life without the addition of color according to their copyright owners. Joseph Adelman, Senior Vice President of Color Systems Technology, stated: "[T]his revitalization of a dormant product through application of a newly-developed technology will encourage future owners of film to always preserve the original material for availability to distribution/exhibition technologies yet to be invented." [329]

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329. Comment # 3 at 6.

Colorization results in an improved black and white copy since the color encoding company must remove any defacing marks and scratches. Occasionally, these companies must splice together segments of several versions of the same film in order to come up the best possible copy. This represents an important form of restoration. However, colorization does not always require restoration of a black and white print, and thus in many cases, the new copy is only a videotape or a single black and white print with no preservation of preprint materials.

Copyright owners are not the only group concerned with film preservation. [330] The federal government currently has two major archives for film storage -- the Library of Congress, which contains the largest archive of film in the United States, and the National Archives and Records Administration. Both of these facilities have their own preservation activities, and in addition, the Library provides assistance to the American Film Institute in the preservation and storage of the AFI's film collection. [331]

The Library of Congress is not only the largest archive of film, with over 100,000 titles, but also is the largest converter of nitrate film to acetate "safety stock." Since 1971, the Library has converted almost 12,000 titles to safety stock. Nevertheless, more than 60 million feet of nitrate

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330. For information concerning the preservation efforts of the Directors Guild of America and its members, see Comment #8A.

331. For a detailed look at the amount of materials contained in the largest public and private archives, see material of Gregory Lukow, Acting Co-Director, The National Center for Film and Video Preservation, The American Film Institute, reproduced in Comment #20.

stock remain in need of conversion. At the current rate, the Library will not complete this conversion project for another twenty years. [332]

In addition, the Museum of Modern Art in New York City, the University of California at Los Angeles, and the George Eastman House (International Museum of Photography) in Rochester, New York carry on film preservation activities. [333] The American Film Institute also carries out important preservation activities by raising and distributing millions of dollars to archives nationwide for preservation projects.

Although private sector restoration has created new markets for old films, public archives, including the Library of Congress, cannot market copyrighted films, and are not set up to market public domain films. They may, however, allow their collections to be studied and may, under certain conditions, make videotape copies of films available.

Educators have indicated that videotape is an inadequate teaching format since it does not represent the original composition of the motion picture. Instead, educators prefer the 16mm format. Unfortunately, the number of companies providing films in this format and the number of titles

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[332]. The Library also preserves television programming in its American Television and Radio Archives, established under the 1976 Copyright Act. See P.L. NO. 94-553, 90 Stat. 2541, Section 113 of the Transitional and Supplementary Provisions. See also H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 182-183 (1976).

[333]. Film preservation is not limited to black and films on nitrate stock. Technicolor film prints were beginning to fade as early as three years after initial use. Eastman Kodak, in response to the efforts of director Martin Scorsese, developed an improved color print in 1982 that is expected to last between 88 to 100 years before fading.

available has decreased steadily over the years. [334] Yet, representatives of the Turner Company informed us they have a large library of 16mm films which they would be delighted to license, more or less at cost.

This chasm between supply and demand illustrates the need for better coordination of private sector and public efforts. Congress may well decide that a forum in which both of these groups can coordinate their efforts would lead to greater present and future restoration and preservation of our nation's film heritage, thereby increasing the public's access to these works.

As noted above, restoration and preservation are expensive, time-consuming and painstaking processes, requiring the incentives of copyright and the free market in combination with the efforts of expert public archivists.

In 1976, the House Committee on the Judiciary recognized the "deplorable fact that in a great many cases the only existing copy of a film has been deliberately destroyed...." The Committee also noted that the efforts of the Library of Congress, the American Film Institute, and other organizations to "rescue this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for purposes

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334. There are, at present, only two U.S. distributors of 16mm prints. See Comment #1, Statement of Society for Cinema Studies at 14. The number of "revival" houses showing classic films is also decreasing. See New York Times, March 3, 1989, p. C4 (the Film Forum, a lower Manhattan twin movie theater showing foreign, classic, and independent motion pictures is to be demolished to make way for a 20-25 story office building. The building is owned by Trinity Church which stated that "we have an obligation to maximize our resources for the church... .").

of archival preservation certainly falls within the scope of 'fair use.'" 335

Thirteen years later, much has been accomplished to restore and preserve this "irreplaceable contribution." Yet, much more remains to be done. Increased cooperation among all concerned with this laudable effort will assure that the goal of restoring and preserving America's existing film heritage will be reached.

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335 H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 73 (1976).

CHAPTER 7: CONCLUSIONS

In reaching our conclusions, we have had the benefit of detailed, informative written comments, a full day of testimony from a wide cross-section of industry, academic, and public interests, as well as three years of congressional hearings that touched on the question of moral rights.

The term "moral rights" does not have a precise definition; in general, it refers to noneconomic rights permitting a creator to ensure that his or her personal vision, as embodied in a work of authorship, is respected. The principal moral rights are those of the right to claim (or disclaim) authorship and the right of integrity. The right to claim or disclaim authorship protects an author's ability to receive credit for his or her creations, or to disclaim authorship of works that he or she did not, in fact, create. The right of integrity permits an author to prevent changes in his or her work that are injurious to his or her honor or reputation; for example, changes that distort or mutilate the author's vision.

Motion pictures are the result of technological innovation. As that technology has improved, the industry and the public have benefitted. Technology has, however, also been used to alter motion pictures after their theatrical release. This has principally occurred in transferring films for broadcast on television and cable systems, and for the home videocassette market. These alterations include the electronic compression or expansion of the running time of the film in order to fit it into

broadcast time slots, as well as "panning and scanning" -- an older form of technology used to compensate for the different size of theatre and television screens. A recent technology, introduced commercially in 1985, is computer color encoding ("colorization") of black and white films. This technology is now used only for the home videocassette market, and for cable and broadcast television.

The Directors Guild of America, and some actors, writers, and cinematographers, have protested these post-theatrical changes to motion pictures and have sought federal legislation granting them a higher level of moral rights than they now enjoy, which they would use to prevent (or permit) these alterations. The motion picture producers and corporations doing the computer color encoding, as well as broadcasters and video retailers have all resisted these efforts. These groups argue that the marketplace and individual and collective bargaining adequately protect the rights of all involved, including the public, and that legislation along the lines advocated by the directors would adversely affect both the creation of motion pictures and the public's access to existing motion pictures.

Predictably, some of the evidence presented to us was speculative; e.g., the effect of an increase in the level of moral rights on the marketplace for motion pictures. Not surprisingly, the parties offered opposing opinions on the nature of that effect. Of course, absent actual implementation of such increased rights, hard data will not be available. We are not bereft, however, of any evidence. In the past, directors and others involved in the creation of motion pictures have collectively bargained for increased artistic control of their contributions to the film,

while the producers have fought these demands tooth and nail, claiming that if they were adopted, the industry would suffer irrevocable damage. In some instances, the directors and other creative participants won the battle for increased artistic control, and in these instances, the predicted damage did not occur. As a consequence, we have not uncritically accepted either side's predictions that civilization as we know it will cease to exist if their respective positions are not completely adopted.

We have also had the benefit of the experiences of foreign countries that have both developed motion picture industries and a high level of moral rights.

Accordingly, the conclusions we have reached are based upon a careful analysis of the best available evidence, with the realization that that evidence is, of necessity, partially incomplete. It is not so incomplete, however, that informed judgment is impossible.

Before proceeding to our conclusions, we pause to note a fundamental assumption we have made -- namely, that in adhering to the Berne Convention, the United States has affirmatively declared its acceptance of moral rights. This assumption is based on Article 36(2) of the Paris text of the Berne Convention, which states that "at a time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention," and on Sec. 2(3) of the Berne Implementation Act of 1988, P.L. 100-568, 102 Stat. 2853, which declares that "[t]the amendments made by this Act, together with the law as it exists on the date of enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention..., " as well as an extensive

legislative history covering the question.

Article 6bis of the Berne Convention mandates the provision of the right to claim authorship and the right of integrity. The legislative history of the Berne Implementation Act of 1988 is replete with references to existing federal and state law as providing a sufficient level of moral rights to fulfill our obligations under Article 6bis. While there has been a healthy debate over the accuracy of this opinion, it nevertheless reflects Congress's considered judgment, and our charge from the Subcommittee did not include reexamination of this question.

The issue then, is not whether there should be moral rights at all-- Congress has already answered that question affirmatively -- but, whether there should be changes in existing law, at least with respect to the motion picture and television industries. Our conclusions on that issue follow:

> (1) The Subcommittee should seriously consider a unified federal system of moral rights protection.

Isolating the motion picture and television industries from the larger context of moral rights for all forms of authorship is difficult, if only because of those industries' pervasive use of other forms of authorship, including novels, short stories and musical compositions. Beyond this, we conclude that the fundamental policy reasons supporting moral rights in the motion picture and television industries apply with equal, if not greater, force to other forms of authorship, and exist independently of industry-specific problems.

While much can be said for permitting a diversified approach to moral rights to develop in the states, strong arguments can be made for creating a unified federal system. As the Register of Copyrights wrote in his 1965 Supplementary Report on the general revision effort:

> A single federal system would carry forward the basic purposes of the Constitution which, as Madison's famous statement in "The Federalist" shows, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when works can be disseminated instantaneously throughout the world, this uniformity is not only a positive advantage with respect to the use of works on national scale, but it also has tremendous importance when it comes to international dealings.[336]

These sentiments ring ever more true today, twenty-four years later, and especially after our adherence to the Berne Convention.

> (2) If Congress adopts a unified federal system of moral rights, it should partially preempt state moral rights protection.

Adoption of a federal moral rights regime necessarily requires at least consideration of preemption of moral rights under state statutory and common law. Congress could adopt a number of possible approaches in resolving this issue. First, it could provide that nothing in the Copyright

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336. Register of Copyrights' Supplementary Report on the General Revision of the U. S. Copyright Law: Copyright Law Revision Part 6 at 82 (1965).

Act as amended would preempt any state law, thereby giving the states the freedom to provide variations on moral rights found in the federal statute as well as permitting them to provide additional rights. Second, Congress could preempt all efforts by the states in the entire field of moral rights, regardless of whether such rights were provided in the Copyright Act. And, third, Congress could preempt state efforts only in the areas covered in the Copyright Act, as amended, while permitting the states to accord other rights.

There are advantages and disadvantages inherent in each approach. The first approach permits states free rein to experiment and adopt rights fitting local conditions; however, by so doing, Congress creates the possibility of a patchwork quilt of treatment for the same right. For example, Congress could amend the Copyright Act to provide for a right to claim authorship for certain works but deliberately exclude computer programs. California could then provide a right to claim authorship for computer programs. Since computer programs are marketed nationally, the practical effect would be national adoption of the California statute. We also note that most of the state statutes provide for perpetual rights, an important consideration in light of the U.S. Constitution's "limited times" provision. For these and other reasons, the first approach has serious drawbacks.

The second approach -- preempting all state moral rights regardless of whether the federal statute provides the right -- appears to interfere needlessly with the valuable role states play in experimenting with new rights. The need for national uniformity is not so strong that it need

preempt state efforts in areas outside of the right to claim authorship and the right of integrity. Indeed, Congress may well benefit from state experimentation in such areas. A possible disadvantage with this approach, though, is that such state rights might conflict with economic rights provided in the Copyright Act. Of course, should such conflicts arise, Congress is free to pass legislation preempting the state right.

> (3) If the Subcommittee prefers an industry-by-industry approach to moral rights, it should carefully consider whether the existing web of collective and individual bargaining in the motion picture industry provides an adequate framework for resolution of the issues.

We recognize there are good arguments supporting a cautious, industry-by-industry approach, one that accords rights only to particular types of subject matter, e.g., works of the fine arts. Rights and exemptions could be crafted with some precision and experience could be gained about the practical effects of a higher level of moral rights in the marketplace.

Should the Subcommittee opt for this approach, we are not convinced directors have necessarily made out a sufficient case to warrant extraordinary treatment outside of omnibus moral rights legislation. Of all categories of authors, directors are, in many ways, in the best position to obtain the desired rights through individual negotiation or collective bargaining. That such rights have not been fully obtained does not

automatically indicate that legislation is needed. In any individual or collective bargaining negotiation, priorities are established and compromises are made. We are not convinced that the present situation is the result of inequitable bargaining strength, at least if one compares the present rights and income enjoyed by members of the Directors Guild in contrast with those of the U.S. workforce as a whole.

The evidence also suggests that directors do not seek moral rights legislation strictly for the purpose of preserving the original theatrical version of the motion picture, but rather seek increased rights for the purpose of giving individual directors the option to permit or prohibit alteration of their work.[337] While there is nothing wrong with such a desire, it does undercut the directors' invocation of the public interest as a basis for legislation.

Nor do we conclude that the public interest has suffered under the present structure. Never before in the history of the motion picture industry have so many works been so readily available and in so many formats. It is true that the marketplace is not perfect and that some of these formats may represent alterations of the original work that directors and others decry. However, there is no evidence suggesting that copyright owners are withholding or intend to withhold the original forms of these works from the marketplace for aesthetic reasons, or because they supposedly want to "push" the "colorized" version of the work. As long as

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337. This does not, of course, apply to directors' attempts to prevent material alterations to works of other directors created during Hollywood's "Golden Era."

copyright owners continue to make available both the original, unaltered version of the work and the altered version, our system of government has always preferred that the ultimate choice be left to the public. Any new federal moral right that would eliminate this choice would have to be very closely examined. It does seem to be the case, however, that the number of original works is decreasing. This appears to be attributable, though, to nonaesthetic, market forces.

Nevertheless, moral rights do serve a valuable public purpose, and the Subcommittee may conclude, therefore, that legislation to increase these rights is appropriate.

> (4) If the Subcommittee chooses to increase moral rights in the motion picture industry, the Copyright Office could support this effort in principle. This legislation would accord rights only to works created on or after the effective date of the legislation and would be granted to authors of preexisting works used in motion pictures, as well as to other creative participants in the motion picture (e.g., cinematographers, art directors, editors, actors and actresses).

If the Subcommittee chooses to increase the level of moral rights protection in the motion picture industry apart from omnibus moral rights legislation, the Copyright Office could in principle support appropriately drafted, constitutional legislation. Due to the likelihood that the takings clause of the Fifth Amendment would prevent Congress from enacting restrictions on existing motion pictures, Congress might want to encourage

the establishment of a voluntary industry-wide steering committee apart from the collective bargaining apparatus to work toward establishing voluntary standards or industry guidelines that would identify practices that are acceptable and those that are not.

Any future legislation should extend moral rights prospectively only to works created on or after the date of enactment and would extend those rights to authors of preexisting works used in motion pictures created on or after the date of enactment (e.g., to authors of novels and short stories and to composers), as well as to all participants who make copyrightable contributions to the actual creation of the motion picture (e.g., cinematographers, art directors, editors, and perhaps, actors and actresses).

On an issue not directly related to copyright, we received evidence suggesting that the economics of the marketplace have resulted in reduced general availability of unaltered forms of motion pictures. This trend will most likely continue. Accordingly, Congress should encourage preservation efforts so that the public will have continued access to what, all agree, constitutes a significant part of our cultural heritage. Such steps might include coordinating existing government, private sector, and academic preservation efforts, as well as studying ways to improve and fund future preservation efforts.

The issues raised by the present study are manifold, complex, and not susceptible of "sound bite" conclusions. The conclusions we have reached represent possible legislative responses to these issues.

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February 25, 1988

The Honorable Ralph Oman
Register of Copyrights
Library of Congress
Copyright Office
Department DS
Washington, D.C. 20540

Dear Mr. Oman:

Since our return from Europe and the extraordinarily interesting meetings we and our colleagues held with international film directors, we have been considering how best to deal with the many problems that technology and the marketplace have created for both the integrity of our national film heritage and the creative freedom of filmmakers. We have long been great admirers of films, and of the people who make them. We are concerned about any attempts to debase this form of art.

Film directors have made the argument that the new technologies of colorization, time-compression, and panning and scanning have dramatically impaired the integrity of the art of film making. The directors have passionately argued their case that Federal legislation is needed to protect films from these techniques. Our respect for the creators of these films bolsters our concern about the extent of these techniques, and about what the future holds as the use of these techniques expands.

We are, of course, aware that the Copyright Office has already decided the narrow issue of whether derivative work claims to copyright in colorized motion pictures may be registered. The ultimate determination of copyrightability is, of course, up to the courts.

We would like the Copyright Office to conduct a broader inquiry, relating to the extent of the use of such technologies in the future and to their impact on consumers, artists,

producers, distributors and other affected individuals and industries.

In carrying out this inquiry, the Copyright Office should consult widely, with as broad a spectrum of interests and specialists as possible. In particular, you should consult with representatives of the individuals involved in all facets of creating an audiovisual work; with distributors, broadcasters and other commercial interests that exploit such works or own copyright interests in them, and with consumers, archivists, academics and appropriate governmental agencies, such as the National Endowment for the Arts. Further, in all areas where relevant, it would be of interest to us to know of foreign practices and points of view. Perhaps, as was suggested by Professor Goldstein during his recent testimony, you could do a comparative study of one or two other countries.

Please do not hesitate to consult with the Subcommittee staff at your earliest convenience if you need further information, and to discuss a timetable for conducting your inquiry.

Sincerely,

ROBERT W. KASTENMEIER
Chairman
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

CARLOS MOORHEAD
Ranking Minority Member
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

RWK:vsj

ANNOUNCEMENT
from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF INQUIRY

REGISTRATION OF CLAIMS TO COPYRIGHT
NOTICE OF INQUIRY; COLORIZATION OF MOTION PICTURES

The following excerpt is taken from Volume 51, Number 178 of the Federal Register for Monday, September 15, 1986 (pp. 32665-32667)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. 86-1]

Registration of Claims To Copyright Notice of Inquiry; Colorization of Motion Pictures

AGENCY: Library of Congress, Copyright Office.

ACTION: Notice of Inquiry.

SUMMARY: This notice of inquiry is issued to advise the public that the Copyright Office of the Library of Congress is examining the copyright registrability of colorization (colored versions) of black-and-white motion pictures. This notice is intended to elicit public comment, views, and information which will assist the Copyright Office in developing its practices regarding colorization and may lead to proposals to amend the regulations.

DATES: Initial comments should be received on or before October 15, 1986. Reply comments should be received on or before December 15, 1986.

ADDRESS: Interested persons should submit ten copies of their written comments to Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C. 20559.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20559, telephone (202) 287-8380.

SUPPLEMENTARY INFORMATION: 1. *Originality requirement for derivative works.* The existing Copyright Office regulations provide that "mere variations of . . . coloring" are not subject to copyright. 37 CFR 201.1(a).

It has been suggested,[1] and the courts have held[2] that while color *per se* is uncopyrightable and unregistrable, arrangements or combinations of colors may warrant copyright protection.

Original and quantitatively non-trivial contributions by an author to a preexisting work may sustain a copyright in a derivative work. *Durham Industries, Inc.* v. *Tomy Corporation*, 630 F.2d 905, 909 (2d Cir. 1980). A derivative work is a work "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, . . . or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship is a derivative work." 17 U.S.C. 101 (1982).

Copyright in a derivative work extends only to the new material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. 17 U.S.C. 103(b). The copyright in such a work is independent of, and does not affect or enlarge the scope, duration, ownership or subsistence of any copyright protection in the preexisting material. *Ibid.* Moreover, copyright protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully. *Ibid.*, 103(a).

To be copyrightable, the new material in the derivative work must constitute an "original work of authorship." To be copyrightable, a derivative work must embody new and original creativity that makes the resulting work more than a trivial variation of the original. Thus, the quantity of new matter added is relevant to copyrightabilty. Courts have defined the necessary *quantum* of original creative authorship in different ways, ranging from "a modicum," "a minimum," or "an appreciable amount" of creative authorship. The colorization of motion pictures presents new questions concerning the registrability of claims to copyright. The Copyright Office wants to elicit the views of the public with respect of claims in colorization.

2. *Colorization processes.* A motion picture generally embodies the contributions of many persons whose efforts are brought together to make a cinematographic work of authorship. Copyrightable elements include audio and visual components, literary or dramatic and musical elements, integrated into a unique whole. Mere mechanical or industrial processes however have never served as the basis for original or derivative authorship. Thus, for example, a claim to copyright

[1] NIMMER ON COPYRIGHT Section 2.14 (1985)

[2] *Pantone, Inc.* v. *A. I. Friedman, Inc.*, 294 F. Supp. 545 (S.D.N.Y. 1968); *Sargent* v. *American Greeting*[3] *Corp.*, 588 F. Supp. 912, 918 (N.D. Ohio, 1984).

[3] Error; line should read:
"545, 547 (S.D.N.Y. 1968); Sargent v. American Greeting"

based solely on conversion from 35mm film to one-half inch videocassette will not be registered, even though technical skill is often needed to assure faithful reproduction. In a highly technologic environment, distinguishing industrial artisanship from artistic creativity is not always easy. This is, however, what the Office must do—within the limits of its overall authority—under 17 USC 410(a).

The process of colorization of black-and-white motion pictures is an attempt to respond effectively to the apparent demands and tastes of the viewing public, which tends to prefer color.

The Copyright Office is aware of sharply held differences of view on the aesthetic consequences of colorizing previously distributed black and white film. Although it follows with interest the public and industry debate as to whether colorizations risks "mutilating" the conscious artistry of black-and-white cinematographers, these issues can not and do not form any part of this present inquiry.

Colorization practices tangentially raise questions about the term of copyright. Motion picture marketing practices might, in some cases, result in the effective extension of the copyright term in copyrighted preexisting works or in the recapture of works previously in the public domain. The Copyright Office requests that parties with knowledge of industry practices address these and other possibilities.

To date, the Copyright Office is aware that at least two enterprises have ventured in the business of colorization. They are the Color Systems Technology, Inc. (hereafter "CST") of Hollywood, California, and the Colorization, Inc. of Toronto, Canada. The systems may involve the use by "colorists" and art directors of computer data bases storing information gleaned by researchers relating to the actual color of costumes, sets, locales, and performers in black-and-white films. They apparently involve the application of colors to shots in films by individuals interacting with computers and special software. "Perfection" of the results may involve use of animation techniques. Once the colorists make certain initial decisions, the actual process of imposing color onto the entire film appears to be largely computer directed.

In addition to these computer-assisted coloring systems, another means of adding color to film exists, known as "Chromaloid." A so-called "color-retrieval" process, it does not appear to be computer-assisted.

3. *Specific questions.* To assist the Copyright Office in determining the registrability of colorized black-and-white motion pictures, comments are specifically requested on the following questions:

1. Which steps, if any, in the colorization processes involve individual creative human authorship?

2. Who are the authors of the copyrightable elements, if any, in colorized film?

3. With specific reference to the role of computer programs in colorization processes:

(a) How are colors selected? How are colors made available for selection? What factors influence color selection? How wide is the range of choice?

(b) In addition to coloring in the strict sense, are other cinematographic contributions, such as animation or other hand or computer assisted effects, utilized in colorizing?

4. Are all colorization processes intended solely to create videotapes in color? Are any methods now available or under development that would permit the commercially feasible colorization of 35mm prints of a quality that would permit theatrical distribution?

Copies of all comments received will be available for public inspection and copying between the hours of 8 a.m. and 4 p.m., Monday through Friday, in the Public Information Office, Room 401, James Madison Building, Library of Congress, 1st & Independence Avenue, SE., Washington, DC 20559.

If the Copyright Office decides to propose any change in the relevant regulations, it will publish a proposed text in the **Federal Register** and invite further comments at that time.

Authority: 17 U.S.C. 406, 410, and 702.

List of Subjects in 37 CFR Part 202

Claims, Copyright, Copyright Office, Registration of claims to copyright.

Dated: August 20, 1986.

Ralph Oman,

Register of Copyrights.

Approved:

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 86-20712 Filed 9-12-86; 8:45 am]

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ML-356
October 1986 - 500
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ANNOUNCEMENT
from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF REGISTRATION DECISION

COPYRIGHT REGISTRATION FOR COLORIZED VERSIONS OF BLACK AND WHITE MOTION PICTURES

The following excerpt is taken from Volume 52, Number 119 of the Federal Register for Monday, June 22, 1987 (pp.23443-23446).

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. RM 86-1A]

Copyright Registration for Colorized Versions of Black and White Motion Pictures

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of registration decision.

SUMMARY: This notice of a registration decision is issued to inform the public that the Copyright Office of the Library of Congress has determined that claims to copyright in certain computer-colorized versions of black and white motion pictures may be registered. The notice gives guidance to the public about the standards and practices governing registration of computer-colorized motion pictures. The notice also confirms the validity of existing regulation 37 CFR 201.1(a), prohibiting [1] copyright registration for mere variations of coloring.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20559. Telephone (202) 287-8380.

1 Error: line should read: "regulation 37 CFR 202.1(a), prohibiting"

SUPPLEMENTARY INFORMATION:

Registration of Colorized Black and White Motion Pictures As Derivative Works

1. Background

The Copyright Act, title 17 of the U.S. Code, defines a derivative work as "a work based upon one or more preexisting works such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other *modifications, which, as a whole, represent an original work of authorship,* is a "derivative work." 17 U.S.C. 101 (emphasis added).

The Copyright Act also spells out that copyright protection in a derivative work "extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and *does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.*" 17 U.S.C. 103(b) (emphasis added).

An existing Copyright Office regulation provides that "mere variations of . . . coloring' are not subject to copyright. 37 CFR 202.1(a). This does not preclude registration where the work contains some other elements of originality such as an original arrangement or combination of colors. Courts have held that while color *per se* is uncopyrightable and unregistrable, arrangements or combinations of colors may warrant copyright protection.[1]

Between 1985 and 1986, several parties submitted the colorized versions of ten motion pictures and one television program to the Copyright Office for registration of the colorized version as a derivative work. The Copyright Office did not register any of these works. Because of the unusual nature of the claimed authorship and to obtain information about the process of creating the colorized versions from persons other than the claimants, on September 15, 1986, the Copyright Office published a Notice of Inquiry in the **Federal Register** (51 FR 32885) asking for comments in four specific areas.

1. **Which stage, if any, in the colorization processes involve individual creative human authorship?**

2. **Who are the authors of the copyrightable elements, if any, in colorized film?**

[1] See also 1 Nimmer on Copyright 3 § 2.14 (1985).

3. With specific reference to the role of computer programs in colorization processes:

(a) How are colors selected? How are colors made available for selection? What factors influence color selection? How wide is the range of choice?

(b) In addition to coloring in the strict sense, are other cinematographic contributions, such as animation or other hand or computer assisted effects, utilized in colorizing?

4. Are all colorization processes intended solely to create videotapes in color? Are any methods now available or under development that would permit the commercially feasible colorization of 35mm prints of a quality that would permit theatrical distribution?

The Copyright Office explained that it was interested in this information in order to come to a determination of whether the coloring of black and white motion pictures is subject to copyright registration; furthermore, the Copyright Office specified that aesthetic or moral arguments about the propriety of coloring black and white film did not, and could not, form any part of its inquiry.[5]

2. Summary of the Comments

In all 48 comments (43 original and three reply) were filed with the Copyright Office. Despite the Copyright Office's caveat against arguments regarding aesthetic considerations, many of the comments filed related simply to the question of whether or not the commentator found the colorized motion picture aesthetically pleasing. And most did not. Other comments attempted to respond to the four question areas set out in the Notice of Inquiry.

a. *The colorization processes.* The Copyright Office noted the existence of two different types of processes in which color is added to a black and white film. One ("chromoloid") involves a color-retrieval process and the other ("colorization") adds color to individual scenes and then the entire film. The second system is the one used by both the Color Systems Technology, Inc. of Hollywood, and Colorization, Inc. of Toronto, Canada.

(1) *The chromoloid process.* In this process a fine grained black and white positive print is first reproduced by an optical printer in three distinct prints: red, blue, and green. Then a subsequent printing process combines the three prints into a single full color film. This process was not described in any of the comments, and no films colored by this process have been submitted to the Copyright Office for registration.

(2) *The colorization process.* Both the Canadian firm, Colorization, Inc. that is associated with Hal Roach Studios, and Color Systems Technology use separately developed processes that basically involve colorization of one frame by a computer operator and then colorization of each succeeding frame in the entire scene by the computer.

The first step of the colorization process is to transform a pristine black and white print to a videotape. This videotape is then broken down into discrete scenes and sequences. A color plan is developed for each scene as well as the entire videotape. The spectrum of colors initially available is virtually unlimited,[6] but colors are generally selected to convey a particular time period, to create a certain mood, and to be faithful where possible to the coloring of the actors and actresses involved.

Next an artist uses a computer controlled graphics tablet and an electronic palette to hand-color key frames. Then a high-speed computer is directed to color the intervening frames, gearing adjustments to variations in the luminosity of the black and white original.

Each color converted scene is reviewed and revisions are made where necessitated, *e.g.*, where dictated by a change in one of the intervening frames not consistent with the hand-colored key frame.

b. *Original authorship.* Although the general public response was against copyright registration on aesthetic grounds, the consensus of those who responded regarding the legal issue of original authorship was that colorized versions of black and white motion pictures satisfied the copyright law's standard for copyright subject matter. They based this argument on the position that the creation of a computer color version is a process that involves individual creative human authorship and requires an amount of technical or artistic judgment that meets copyright law standards of original, creative expression. One justification was that all of the steps involved in colorization involve human authorship since the process is directed by human operators who follow the dictates of a human art director. The more prevalent justification is that the selection, coordination and application of color, and the review of the final product amount to "individual creative human authorship."

Those opposed to copyright registration asserted that colorizing is a technical process that does not have sufficient *human* authorship to merit copyright protection. This commentator examined three steps involved in the process: color selection, the data base, and the computer program and argued that none justify registration of colorized films under the following tests for derivative works claims:

(1) Are they based on more than ideas or mere facts and

(2) If so, are they based on more than trivial variations in the actual expression of an underlying work, these being both

(a) Attributable to original authorship and

(b) Representing a modicum of creativity.

As to color selection the opponents claimed that an artist's selection of palette is an idea that has not as yet produced any copyrightable expression. As to the "data base," this party noted that copyright does not cover the factual content of a work and contended that it is the color facts in the data base which are integrated into a preexisting visual pattern of the black and white film that is being reprocessed. These patterns, it was argued, serve as the actual expression in the new video product, which merely organizes the facts previously compiled in a different order. Furthermore, the opponents argued that "the protectible forms in which the facts were once complied, that is, expressed and organized, say, as a computer-readable data base, will, in the final video product, be quite simply left behind. . . ." Finally, the opponents asserted that copyright in a computer program cannot also support a claim in the product or output of the program—in this case the color-recoded film.

Several commentators raised the issue of whether only the handcolored scenes and not those done by computer are copyrightable. Another related issue is even if sufficient human authorship exists given today's colorization technology, what happens to a copyright claim when the complete coloring process is done by a computer program?

3. Appropriate Judicial Standard

Proponents and opponents would probably agree that whether or not a derivative work will support a copyright depends upon whether it is a distinguishable variation or merely a trivial variation. *See L. Batlin and Son* v.

[5] Copyright registration determinations cannot be made on aesthetic grounds. Original works of authorship that meet the legal and formal requirements of the Copyright Act are entitled to registration, irrespective of their artistic worth. Moreover, the present federal copyright law does not extend protection to the so-called "moral right" of an author to prevent the distortion or mutilation of the work, after transfer of the copyright.

[6] The comment of Colorization, Inc. alleges that selections are made from a palette of 16 million colors, from which 4,096 colors are selected for each movie and 64 colors for each scene.

Snyder, 536 F.2d 486 (2d Cir. 1976), *cert. denied*, 429 U.S. 857 (1976). The disagreement between the two sides centers on what makes a variation distinguishable and also on whether a higher standard is required for a derivative work, especially if it is based on a work that is already in the public domain.

The second circuit held in the *Batlin* case that a higher standard exists for determining copyrightability of contributions to public domain works. Later this same court said that copyright for derivative works is subject to two related and important limitations:

1. To support a copyright the original aspects of a derivative work must be more than trivial.

2. The scope of protection afforded a derivative work must reflect the degree to which it relies on the preexisting material and must not in any way affect the scope of any copyright in this preexisting material.

Durham Industries, Inc. v. *Tomy Corporation*, 630 F.2d 908, 909 (2d Cir. 1980).

The seventh circuit has also indicated that a higher standard of originality is required in derivative works in order to prevent the first creator of a derivative work from interfering with the right of subsequent authors to depict the underlying work without fear of copyright problems. *Gracen* v. *Bradford Exchange*, 698 F.2d 300 (7th Cir. 1983).

Proponents of copyright for computer-colorized films assert that the *Gracen* case is a misreading of *Batlin*, that *Batlin* grapples with the problem of substantial similarity in the case of works grounded in common antecedents, and that the ruling does not deny copyright registrability to colorized motion pictures which meet the tests of original authorship as set out in *Batlin* and other cases.

Opponents of copyright in computer-colorized films argue that colorizing a film does not meet the *Batlin* test for authorship in derivative works. They interpret *Batlin* as distinguishing between human contributions that require sustained "artistic skill and effort" and those that exhibit only "physical skill" or technical competence. The former could be copyrightable; the latter would not.

Before the *Batlin* case was decided, a district court upheld the copyrightability of a compilation of colors on the basis of color selection which the court found to require "careful consideration of numerous artistic factors including the aesthetic attributes of each shade and its use in the commercial art field." *Pantone Inc.* v. *A. J. Friedman Inc.*, 294 F.Supp. 545, 547 (S.D.N.Y. 1968).

4. Registration Decision

After studying the comments responsive to the questions listed above, the Copyright Act, and the case law, the Copyright Office has concluded that certain colorized versions of black and white motion pictures are eligible for copyright registration as derivative works. The Office will register as derivative works those color versions that reveal a certain minimum amount of individual creative human authorship. This decision is restricted to the colorized films prepared through the computer-colorization process described above. No comments were received regarding the chromoloid process, and no claims are pending before the Copyright Office. The record before us does not contain sufficient information to make a decision regarding chromoloid films.

The Copyright Office finds that the issue of copyright in computer-colorized films requires a difficult determination of the presence of original authorship. The policy of the existing regulation prohibiting registration for "mere variations . . . of coloring" is sound and fully supported by case law. *Kitchens of Sara Lee, Inc.* v. *Nifty Foods Corp.*, 266 F.2d 541, 544–545 (2d Cir. 1959); *Manes Fabric Co., Inc.* v. *The Acadia Co.*, 139 U.S.P.Q. 339, 340 (S.D.N.Y. 1960); *Christianson* v. *West Publishing Co.*, 53 F. Supp. 454, 455 (N.D. Calif. 1944), *aff'd* 149 F.2d 202 (9th Cir. 1945). The regulation is applied by the Copyright Office to deny registration when the only authorship claimed consists of the addition of a relatively few number of colors to an existing design or work. The regulation also prohibits registration of multiple colored versions of the same basic design or work. Registration is not precluded, however, where the work consists of original selection, arrangement, or combinations of a large number of colors, or where the lines of an original design are fired by gradations of numerous colors. The Copyright Office finds that these registration practices are consistent with the standards of original authorship set by the Copyright Act, and we affirm the validity of the existing regulation.

The Office concludes that some computer-colorized films may contain sufficient original authorship to justify registration, but our decision is a close, narrow one based on the allegations that the typical colorized film is the result of the selection of as many as 4000 colors, drawn from a palette of 16 million colors. The Office does not consider registration would be justified based on a claimed "arrangement" or "combination" of the colors because the original black and white film predetermines the arrangement of colors. The Office is concerned about implications of registering a claim to copyright in public domain films based on colorizing, and we address that point below. Our decision is also limited to existing computer-coloring technology. We will monitor technological developments, and may reconsider the issue if the role of the computer in selecting the colors becomes more dominant.

The general standard for determining whether the color added to a black and white motion picture is sufficient to merit copyright protection is the statutory standard that already applies to all derivative works, i.e. "modifications" to a preexisting work "which, as a whole, represent an original work of authorship." 17 U.S.C. 101. In determining whether the coloring of a particular black and white film is a modification that satisfies the above standard, the Office will apply the following criteria:

(1) Numerous color selections must be made by human beings from an extensive color inventory.

(2) The range and extent of colors added to the black and white work must represent more than a trivial variation.

(3) The overall appearance of the motion picture must be modified; registration will not be made for the coloring of a few frames or the enhancement of color in a previously colored film.

(4) Removal of color from a motion picture or other work will not justify registration.

(5) The existing regulatory prohibition on copyright registration based on mere variations of color is confirmed.

When registration is warranted, the copyright will cover only the new material, that is, the numerous selections of color that are added to the original black and white film. The copyright status of the underlying work is unaffected. The black and white film version will remain in the public domain or enter the public domain as dictated by its own copyright term. When an underlying work is in the public domain, another party is free to use that work to make a different color version which may also be eligible for copyright protection.

List of Subjects in 37 CFR Part 202

Claims, Claims to copyright, Copyright registration.

A proposed rule on deposit of computer-colorized films will be published separately.

Dated: June 11, 1987.

Ralph Oman,

Register of Copyrights.

Approved by:

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 87–14091 Filed 6–19–87; 8:45 am]

BILLING CODE 1410–07–M

NOTICE OF PROPOSED RULEMAKING

COPYRIGHT REGISTRATION FOR COLORIZED VERSIONS OF BLACK AND WHITE MOTION PICTURES; PROPOSED RULEMAKING

The following excerpt is taken from Volume 52, Number 121 of the Federal Register for Wednesday, June 24, 1987 (pp23691-23692)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. RM 86-1B]

Copyright Registration for Colorized Versions of Black and White Motion Pictures; Proposed Rulemaking

AGENCY: Copyright Office, Library of Congress

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking is issued to inform the public that the Copyright Office of the Library of Congress has determined that claims to copyright in certain computer-colorized versions of black and white motion pictures may be registered upon compliance with proposed new deposit requirements. The notice informs the public and invites comment with respect to proposed regulations that would require the deposit of a black and white print along with a copy of the computer-colorized version in order to register a claim to copyright in the selection of colors.

DATES: Written comments should be received on or before July 24, 1987.

ADDRESSES: Ten copies of written comments should be addressed, if sent by mail, to: Library of Congress, Department 100, Washington, DC 20540; if delivered by hand, copies should be brought to: Office of the General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room 407, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20559, Telephone (202) 287-8380.

SUPPLEMENTARY INFORMATION:

Registration of Colorized Black and White Motion Pictures As Derivative Works

1. Background

An existing Copyright Office regulation provides that "mere variations of coloring" are not subject to copyright. 37 CFR 202.1(a). This does not preclude registration where the work contains some other elements of originality such as an original arrangement or combination of colors. Courts have held that while color *per se* is uncopyrightable and unregistrable, arrangements or combinations of colors may warrant copyright protection.[1]

Between 1965 and 1986, several parties submitted the colorized versions of ten motion pictures and one television program to the Copyright Office for registration of the colorized version as a derivative work. The Copyright Office did not register any of these works. Because of the unusual nature of the claimed authorship and to obtain information about the process of creating the colorized versions from persons other than the claimants, on September 15, 1986, the Copyright Office published a Notice of Inquiry in the **Federal Register** (51 FR 32665) and invited public comment regarding the registrability of colorized films.

In all 46 comments (43 original and three reply) were filed with the Copyright Office. After studying the comments, the Copyright Act, and the case law, the Copyright Office concluded that certain colorized versions of black and white motion pictures are eligible for copyright registration as derivative works. On June 22, 1987 the Copyright Office published its decision regarding registration for computer-colorized films at 52 FR 23443. We stated that proposed deposit requirements for registration of computer-colorized films would be published separately. The purpose of this Notice is to propose such rule and [1] invite public comment on them.

[1] *See also* 1 NIMMER ON COPYRIGHT 3 section 2.14 (1985).

2. Deposit of Black and White Version

To facilitate examination of the claim to copyright in the computer-colorized version, at least one commentator suggested that the Copyright Office should require the deposit of a black and white version as well as a colorized copy. Authority for this requirement exists under the general rulemaking authority of 17 U.S.C. 702. In addition, the Register of Copyrights is specifically authorized to specify by regulation, the "nature of the copies or phonorecords to be deposited in the various classes specified." 17 U.S.C. 408(c)(1).

The Copyright Office has decided to propose regulations that would require claimants of copyright in computer-colorized versions of motion pictures to deposit one copy each of the colorized version and of the black and white print from which the colorized version was prepared. Comparison of both copies will enable an examiner to determine better whether the colorized version satisfies the applicable standards for copyright registration. Deposit of the black and white version will also enrich the collections of the Library of Congress since in many cases the older black and white films were never registered or otherwise deposited with the Library.

3. Regulatory Flexibility Act Statement

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress and is a part of the legislature branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (Title 5 Chapter 5 of the U.S. [2] Code, Snbchapter II and Chapter 7). The Regulatory Flexibility Act consequently

1 Error: line should read;
"this Notice is to propose such rules and "

2 Error: line should read;
"amended (title 5 Chapter 5 of the U.S."

does not apply to the Copyright Office 3 since that Act affects only those entities of the Federal Government that are agencies are defined in the 4 Administrative Procedure Act.[2]

[2] The Copyright Office was not subject to the Administrative Procedure Act before 1978, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (i.e., "all actions taken by the Register of Copyrights under this title [17], except with respect to the making of copies of copyright deposits) [17 U.S.C. 706(b)]. The Copyright Act does not make the Office an "agency" as defined in the Administrative 5 Procedure Act. For example, personnel actions taken by the Office are not subject to APA–POSA requirements.

Alternatively, if it is later determined by a court of competent jurisdiction that the Copyright Office is an "agency" subject to the Regulatory Flexibility Act, the Register of Copyrights has determined and hereby certifies that this proposed regulation will have no significant impact on small businesses.

List of Subjects in 37 CFR Part 202

Claims, Claims to copyright, Copyright 6 registration.

Proposed Regulations

In consideration of the foregoing, the Copyright Office proposes to amend Part 202 of 37 CFR, Chapter II.

1. The authority citation for Part 202 would continue to read as follows:

Authority: Copyright Act, Pub. L. 94–553, 90 Stat. 2541 [17 U.S.C. 702].

2. Section 202.20(c)(2)(ii) would be amended by adding the following sentence at the end thereof:

§ 202.20 Deposit of copies and phonore 7 cards for copyright registration.

* * * * *

(c) * * *

(2) * * *

(ii) *Motion pictures.* * * * In the case of colorized versions of motion pictures made from pre-existing black and whitre 8 motion pictures, in addition to the deposit of one complete copy of the colorized motion picture and the separate description of its contents as specified above, the deposit shall consist of one complete print of the black and white version of the motion picture from which the colorized version was prepared.

* * * * *

Dated: June 16, 1987.

Ralph Oman,

Register of Copyrights.

Approved by:

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 87–14342 Filed 6–23–87; 8:45 am]

BILLING CODE 1410–03–M

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3 Error: line should read;
"does not apply to the Copyright Office"

4 Error: line should read;
"agencies as defined in the"

5 Error: line should read;
" "agency" as defined in the Administrative"

6 Error: line should read;
"Claims, Claims to Copyright, Copyright Registration"

7 Error: line should read;
" § 202.20 Deposit of copies and phonorecords for copyright registration"

8 Error: line should read;
"made from pre-existing black and white"

ANNOUNCEMENT
from the Copyright Office, Library of Congress, Washington, D.C. 20559

REQUEST FOR INFORMATION; NOTICE OF HEARING

REQUEST FOR INFORMATION; NOTICE OF HEARING,
NEW TECHNOLOGY AND AUDIOVISUAL WORKS.

The following excerpt is taken from Volume 53, Number 101 of
the Federal Register for Wednesday, May 25, 1988 (pp.18937-18938)

LIBRARY OF CONGRESS

Copyright Office

[Docket RM 88-3]

Request for Information; Notice of Hearing, New Technology and Audiovisual Works

AGENCY: Library of Congress, Copyright Office.

ACTION: Request for information; notice of hearing, new technology and audiovisual works.

SUMMARY: The Copyright Office of the Library of Congress issues this request for information to advise the public that it is inquiring and intends to hold a public hearing on issues concerning how new technologies such as colorization, time compression, and panning-and-scanning affect the creation and uses of audiovisual works, including motion pictures and television programming. This notice invites participation in a public hearing intended to elicit comments, views, and information that will assist the Office in understanding the extent of the present use of these new technologies in conjunction with audiovisual works, the problems, if any, that this technology may create for both the integrity of our national film heritage and the creative freedom of filmmakers, as well as the extent such technologies are expected to be used in the future and their impact on consumers, artists, producers, distributors, and other affected individuals and industries. Written comments are also solicited.

The Office particularly invites comment from or participation by representatives of organizations of individuals involved in creating audiovisual works; with distributors, broadcasters and other commercial interests that exploit such works or own copyright interests in them; with consumers, institutional film collectors, archivists, academics, libraries, and government agencies.

DATE: The hearing will be held on September 8, 1988 in Washington, DC. Anyone desiring to testify should contact the Office of the Register of Copyrights at (202) 287-8350 by August 24, 1988. Ten copies of written statements should be submitted to the Copyright Office by 4:00 p.m. on August 17, 1988, if possible, and in any case no later than August 24, 1988. Written comments are also invited from persons who do not wish to testify, and should be submitted by September 22, 1988.

ADDRESSES: The hearing will be held on September 8, 1988 in the Mumford Room of the James Madison Memorial Building (LM-649), Sixth Floor, Library of Congress, First and Independence Avenue, SE., Washington, DC, beginning at 9:30 a.m.

Ten copies of written statements, supplementary statements, or comments should be submitted as follows:

If sent by mail: Library of Congress, Department 100, Washington, DC 20540.

If delivered by hand: Office of the Register of Copyrights, Copyright Office, James Madison Memorial Building, Room 403, First and Independence Avenue, SE., Washington, DC 20559.

All requests to testify should clearly identify the individual or group desiring to testify.

FOR FURTHER INFORMATION CONTACT: William Patry or Eric Schwartz, Policy Planning Advisors to the Register of Copyrights, Copyright Office, Library of Congress, Washington, DC 20559. Telephone: (202) 287-8350.

SUPPLEMENTARY INFORMATION: At the request of the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, the Copyright Office is conducting an inquiry and preparing a report on the effect new technologies such as colorization, time compression and panning-and-scanning have on the creation and exploitation of audiovisual works, including motion pictures and television programming.

On June 22, 1987 the Copyright Office issued a Notice of Registration Decision regarding claims to copyright in certain computer-colorized versions of black and white motion pictures. 52 FR 23443-23446. The Notice informed the public that, after having received and reviewed 46 comments about the nature of claimed authorship in and the process of creating computer-colorized versions of black and white motion pictures, the Office had concluded that some computer-colorized films may contain sufficient authorship to justify registration. The standard to be applied in determining whether the color added to a black and white motion picture satisfies the originality standard for protection is that which already applies to all other derivative works; i.e., modifications "which, as a whole, represent an original work of authorship." 17 U.S.C. 101 (definition of "derivative work"). The notice then enumerated five criteria the Office

RL-188
July 1988-500

would apply in determining whether the coloring of a particular black and white film is a modification that satisfies this statutory standard. The Notice of Registration Decision noted that registration determinations cannot be made on aesthetic grounds and, accordingly, that aesthetic or moral arguments about the propriety of coloring black and white films did not form any part of the inquiry.

On June 24, 1987, the Office published a separate notice of proposed rulemaking regarding the deposit requirements for colorized versions of black and white motion pictures. 119 FR 23691–23692.

This notice does not seek additional comments regarding the registrability of computer-colorized versions of black-and-white audiovisual works. Instead, it seeks information concerning the nature, extent, and effect of these new technologies on creators, distributors, and the public.

Specifically, the Office seeks comments in the following areas:

1. Nature and Impact of the Technology

The Office would appreciate information regarding:

a. Description of the technologies of colorization, time compression, and panning-and-scanning and how and why these techniques are utilized after the creation of an audiovisual work.

b. What considerations are taken into account in deciding whether to use these technologies—commercial, aesthetic, or other factors? How does the use of these technologies affect the integrity of and economic rewards flowing to those involved in the creation of the original work (including but not limited to the director, producer, actors, cinematographers, screenplay authors, soundtrack composers, and set designers)? Have these individuals objected to the use of these technologies, and, if so, how have the objections been resolved?

c. What is the present extent of the use of the technologies and what is the present impact of the technologies on those involved in the distribution of the original and the altered versions of the work? What is the projected future use and impact of these technologies? Are there similar technologies currently in the planning or development stages, and, if so, what is their projected use and impact?

d. What is the impact of the new technologies on public access to audiovisual works? Do they increase or decrease demand for or availability of the original? Do the new technologies have different impact depending upon the medium of distribution; e.g., theatrical distribution, home videocassette sale or rental, and cable or other pay TV mechanisms?

2. Contractual Practices

Do existing contractual or collective bargaining agreements govern the nature and extent of the use of the new technologies, and if not, why not? Are there differences in contract provisions negotiated by established creators and those negotiated by lesser-known artists?

3. Foreign Practices

Have foreign countries addressed any of the issues raised by these new technologies, and if so, how, and are these foreign practices relevant or applicable to practices in the United States?

4. Possible Future Legislative Action

Is there a need for additional legislation to solve the problems caused by the new technologies or should the private contractual or collective bargaining process be relied upon? Would additional legislation upset existing contractual relationships or raise constitutional issues with respect to restrictions on the exploitation of existing rights? If legislation is believed to be necessary and appropriate, what form should it take—federal (e.g., amendments to the Copyright Act or the Lanham Act) or state (e.g., state moral rights statutes) and who should be protected—only the principal director or screenwriter of the original work, or all others involved in the creative process, e.g., the actors, the cinematographers, the screenplay authors, the soundtrack composers, and the set designers? Is it possible or desirable to distinguish between works which should be protected? Should protection be limited to recognized classics, and, if so, how should it be determined if a work is a classic or otherwise deserving of protection?

Copies of all comments received will be available for public inspection and copying between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday, in Room 401, James Madison Memorial Building, Library of Congress, First and Independence Avenue, SE., Washington, DC 20559.

Dated: May 13, 1988.

Approved:

James H. Billington,

The Librarian of Congress.

[FR Doc. 88-11708 Filed 5-24-88; 8:45 am]

BILLING CODE 1410-47-M

ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

FINAL REGULATION

COPYRIGHT REGISTRATION FOR COLORIZED VERSIONS OF BLACK AND WHITE MOTION PICTURES; FINAL RULE

The following excerpt is taken from Volume 53, Number 153 of the Federal Register for Tuesday, August 9, 1988 (pp. 29887 - 29890)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. RM 86-1B]

Copyright Registration for Colorized Versions of Black and White Motion Pictures; Final Rule

AGENCY: Copyright Office, Library of Congress.

ACTION: Final regulation.

SUMMARY: The Copyright Office of the Library of Congress is adopting a final rule with respect to the deposit of a black and white print of a motion picture along with a copy of the computer colorized version in order to register a claim to copyright in the colorized version. This is intended to improve the ability of the Copyright Office to process applications to register claims to copyright.

EFFECTIVE DATE: August 9, 1988.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20559. Telephone (202) 287-8380.

SUPPLEMENTARY INFORMATION: On June 22, 1987, the Copyright Office announced its decision to register certain colorized versions of black and white motion pictures (52 FR 23443). Two days later, the Office published a proposed rule that would require the deposit of a black and white print along with a copy of the computer-colorized version in order to register a claim to copyright in the selection of colors. (52 FR 23601). Interested persons were asked to comment on the proposed rule.

Six comment letters were submitted. Two of these objected to the decision to register claims to copyright in the colorized version. For the reasons given in the June 22, 1987 registration decision, the Office maintains the view that certain colorized films can satisfy the original work of authorship standards of the copyright law.

Of the other four comments, one represents the attorney's own views; two represent groups who are making colorized versions; and the fourth is characterized as a summary of responses to the proposed rule made by thirteen members of the Copyright Office Affairs Committee of the Patent, Trademark and Copyright Section of the American Bar Association ("ABA").[1] These comments specifically address the proposed deposit regulation by questioning in one way or another the Copyright Office's authority to make such a rule, the wisdom of requiring the comparison of the two versions in the examination process, or the necessity of requiring a black and white print as a deposit instead of a black and white videotape. They also raise other issues related to this rulemaking.

[1] The Chairman of this Committee mailed a cover letter summing up his views and past discussion to each member with a space provided for each member to check a box denoting whether he or she agreed with the proposed rule or believed the Committee should oppose the rule. A space was also provided for each member to comment on the rule. It is not clear from the comment submitted to the Copyright Office, primarily a distillation of the views set out in the Chairman's cover letter, how many members made individual comments.

1. The Authority Issue

One attorney questions whether the Copyright Office, a legislative branch agency, should exercise what he characterizes as even broader administrative and executive functions. He contends that the proposed rule on deposit violates both the letter and the spirit of the copyright statute. Eleven of the thirteen ABA committee members who responded felt that the Office lacks the statutory authority to establish the proposed deposit requirement. On the other side, two ABA members including a law professor felt the Copyright Office had sufficient authority to do so. The comments submitted on the behalf of colorizers indicate a willingness to [1] deposit a black and white copy of the motion picture for the benefit of the public without conceding the Office's authority to require one, provided the requirements are reasonable.

The Copyright Office finds that authority for requiring a black and white copy in addition to the colorized copy exists under both the general rulemaking authority of 17 U.S.C. 702 and the specific authority given to the Register of Copyrights to specify by regulation, the "nature of the copies or phonorecords to be deposited in the various classes specified." 17 U.S.C. 408(c)(1). In *National Conference of Bar Examiners v. Multistate Legal Studies, Inc.*, 692 F.2d 478 (7th Cir. 1982), the Seventh Circuit found that the Copyright Act "vest[s] broad authority in the Register of Copyrights to fashion a workable system of registration and deposit of copyrighted works." 692 F.2d at 484. It is clear that the deposit requirements serve many purposes: examination of claims; evidence of the

[1] Error; line should read:
"colorizers indicate a willingness to"

identity, content, and scope of the registered work for litigation and commercial transaction purposes; and enrichment of the collections of the Library of Congress for contemporary users (both the general public and the Congress) and for posterity. The Register of Copyrights is vested with broad authority to establish reasonable deposit requirements that take account of the varied, and sometimes conflicting, purposes of the registration-deposit system.

When the Copyright Office announced its decision to register certain colorized versions of black and white prints, it specified a set of criteria it would use to determine whether the color added to a black and white motion picture is a modification of a preexisting work "which, as a whole, represent[s] an original work of authorship." 17 U.S.C. 101. One of these criteria is that the color added be more than a trivial variation. Another confirms the existing regulatory prohibition on copyright registration based on mere variations of color.

After examination of all of the comments submitted in response to the original Notice of Inquiry and to the proposed regulation, the Copyright Office concludes that the deposit of a black and white film version will facilitate the examination necessary to determine that the colorized version for which registration is sought is more than a trivial variation. Color conversion of films by computer clearly represents a new way of creating derivative works. The Office has stated that it will monitor technological developments to assess further the quantity of human authorship and the degree of control the "technician-author" exercises in relation to the computer. The Office could have adopted other requirements to gain information that would assist in the examination of claims, such as affidavits or other paper documentation. The deposit requirement selected by the Office has the advantage both of facilitating examination to ascertain the fact of original authorship in the colorized version compared to the previous versions of the film, and of enriching the collections of the Library of Congress for the benefit of the public and posterity.

The Office has considered the expense and possible inconvenience to registrants of requiring deposit of the black and white copy. The Office notes that the colorization process itself is expensive. The average cost is $180,000 to $200,000 per film. The cost of a print for registration is modest in comparison, especially when one also considers the value of the intellectual property protected by the registration.

With respect to convenience, in order to make the colorized version, the colorizer must already have access to the black and white version; and, as a rule, this will be a celluloid print. In those cases where the particular copy does not satisfy the archival standards of the Library, special relief may be requested, based on a proposal to deposit the best available, near-archival quality black and white print.

Precedent exists for requiring supplementary or identifying deposit materials in addition to the copy of the work for which registration is sought. In the case of motion pictures, the Copyright Act of 1909 required the deposit of a description of the work in addition to photographs or prints; the regulations issued in 1978 require deposit of a separate description of the contents, such as a continuity or pressbook, in addition to one complete print. When the Copyright Office first registered claims to copyright in computer programs in 1964, the Office [2] required deposit of two machine-readable copies, a complete print-out in human-readable form, and any accompanying manuals, flow charts, or other documentation. Like computer program registration in 1964, registration of computer-colorized motion pictures in the 1980's presents the Office with difficult, new copyright examination issues. The deposit requirement adopted today is responsive to the unique nature of the computer-colorizing process.

2. Comparison of Different Versions

Two comments question the wisdom of allegedly establishing a precedent by comparing the original work and the derivative work to determine the copyrightability of the derivative work.

One comment asserts that if such a practice is limited to colorized motion pictures, it is discriminatory. The commentator maintains that although the proposed deposit rule is not "expressly forbidden," Copyright Office practice and the Compendium of Copyright Office Practices "make it clear that the examination process is not intended to include the making of comparisons." He quotes a pre-1978 regulation which said that the Office does not make comparisons "to determine similarity of works." He also cites a current Compendium statement that the Office does not "*generally* make comparisons of copyright deposits to determine whether or not particular material has already been registered." *Compendium II Copyright Office Practices*, 108.03. (Emphasis added).

The other comment that addresses this issue reports that most of the ABA members who oppose the proposed deposit rule feel that examination of the derivative work by comparison with the original would establish a dangerous precedent. Some of them also expressed the fear that the Copyright Office is moving toward a patent type examination. To the contrary, another ABA respondent asserted that he had already considered all of these arguments, and still felt the proposed deposit requirement to be a good one that would not "place the Copyright Office on a 'slippery slope' toward becoming anything that even begins to approximate the Patent and Trademark Office."

The Copyright Office has considered these arguments especially in light of the grounds asserted for registration of claims to copyright in colorized versions of films. The Copyright Act specifies that the issuance of the certificate follows the examination and determination that "the material deposited constitutes copyrightable subject matter * * *" 17 U.S.C. 410(a). Moreover, "the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. 410(c). The Compendium specifies in section 108.01 that examination is made to determine:

(1) Whether or not the work for which registration is sought constitutes copyrightable subject matter and
(2) Whether or not legal and formal requirements have been met * * *.

The arguments based on the pre-1978 regulation or section 108.00 of the Compendium are not persuasive. Like existing 37 CFR 201.2(a)(1), the pre-1978 regulation cited by one commentator applies to "information given by the Copyright Office," in response to requests from a member of the public. Neither regulation applies to examination of claims to copyright, which is governed by regulations set forth at 37 CFR Part 202 and by the *Compendium*. Section 108.00 would apply to a situation where there is a possibility that more than one colorized version of the same black and white film may exist. In that case the Copyright Office would not "generally" make a comparison based on determining whether a prior colorized version has already been registered, although it may do so occasionally—hence we use the qualifying term "generally."

Thus, even if section 108.03 were applicable, it merely states a *general* practice that admits of exception. While the practice may not be generally known, in fact, the Copyright Office does occasionally compare previously registered works in examining a given claim. We have done so for several decades. The application forms have long requested disclosure of a previous registration (including the registration number) where registration is sought for a derivative work. The comparison is

[2] Error; line should read:
"computer programs in 1964, the Office"

made depending on a number of factors, including the nature of the work, the nature of the authorship claimed as new matter, the availability of the prior registered copy, whether the registration number is known, whether the copy of the pending work discloses information that presents a registration issue (e.g. the year date in the notice) that may be resolved by review of the previously registered work, and so forth. In the past, comparisons have been made especially between unpublished music and published music claims, between ad interim books and the American edition, and between original term works and renewal applications for such works.

The Copyright Office is not embarking, and does not seek to embark, upon a patent or trademark-like examination. The regulations we are adopting will ensure that a Copyright Office examiner will have the necessary material to determine whether the colorized version is more than a trivial variation of the original film from which it is derived. The Office will examine *each* colorized version on its own merits in relation to the material each added to the original black and white film.

3. The Necessity of Requiring a Black and White Print

Three comments are directed to the burden imposed on the registrant of a colorized version by requiring a deposit of a black and white print. One comment argues that if this deposit requirement is retained, it must be recognized as "ancillary" and cannot impose any "meaningful burden" on the copyright owner. Another urges that the proposed deposit rule "imposes a burdensome and expensive" requirement on one type of derivative work. The third comment asserts that real practical impediments exist:

1. No single print of the underlying work may exist.

2. The registrant may not own the black and white print.

3. It would be "extremely difficult, and prohibitively expensive, to produce a 'complete print' of the version upon which the colorized version was based."

Two of these comments assert that the person making the deposit should be given the option of depositing either a videotape or a print of the black and white version. One of them suggests that the regulations could require deposit of "one viewable copy of the black and white motion picture upon which the color-converted version is based." The other insists that a balance is needed to accommodate the needs of the Copyright Office and the Library of Congress without burdening the copyright owner.

On the other side, a film group opposed to registration of colorized film urges that only black and white print is acceptable. This group observes that the black and white videotape used to produce colorized versions "is intentionally printed with low contrast to facilitate colorization" and says that the proposed rule does not recognize the "crucial differences in format" between the colorized motion picture, which exists only on videotape, and the original black and white film, which exists in celluloid. It emphasizes that the black and white videotape is unsuitable for archival purposes and questions whether *any* tape, black and white or color, is a viable form of deposit for archival purposes since it has a short shelf life especially when compared to celluloid print.

While only six parties responded to the proposed new regulation, forty-three responded to the original inquiry concerning registrability. A majority of the individuals who responded to the original inquiry characterized colorization as a desecration of the original black and white film, and many of them expressed the fear that the original black and white film would be lost to posterity. In legislative hearings, colorizers assured the congressional copyright subcommittees that colorizing not only enhances the quality of the old black and white film, but also ensures that the old film will be preserved and will always be available in its original form.[3]

In the original comment period, several of those who supported registration of the colorized version, also saw the need for deposit of the black and white print. The Copyright Office preliminarily concluded that such a deposit would serve two purposes: To enable the examiner to determine better whether the colorized version satisfies the applicable standards for copyright registration, and to enrich the collections of the Library of Congress since in many cases the older black and white films were never registered or otherwise deposited with the Library.[4]

Both in this administrative proceeding and in congressional hearings, one or more proponents of colorization stated that they obtained the best quality print of the original black and white film *before* transferring it to a black and white videotape. Representations were made that restoring the black and white print sometimes meant re-assembling the film by putting together several flawed prints, restoring lost reels, putting the restored work on 35mm, or transferring 35mm nitrate stock to safety stock. In the words of a representative of Hal Roach Studios, "That cost a lot of money. We would not be doing this if we did not feel that we could at least get our money back through colorizing the film. But besides that, we are taking a film that nobody really cared about, preserving it, giving it lasting value and making it available to the public in both black and white and color." This spokesperson went on to say that Hal Roach "has a tremendous film library."[5]

Hal Roach Studios now asserts that it would be extremely difficult, and prohibitively expensive, to produce a "complete print of the version upon which the colorized version was based."[6]

On the other hand, film archivists assert that a black and white videotape will not serve any use for archival purposes. Moreover it would be much more expensive for the Library of Congress to take a black and white videotape and transfer it to a print that would be viable for archival purposes than it would be for the colorizer to prepare a print for deposit. Ultimately the deposit of the black and white videotape would satisfy only one of the purposes the Copyright Office foresaw in proposing the new rule—the examination purpose. Moreover, such a deposit would do nothing to assure for posterity that the black and white prints will be preserved.

On balance, the Copyright Office has decided to adopt the proposed amendment modified by a reference to special relief. Upon a showing in a particular case that the registrant does not own an archival quality print or that it would be prohibitively expensive to prepare a new archival quality print where none is otherwise available, the Copyright Office will consider deposit under special relief. The claimant must in such cases make a good faith effort to deposit the best available, near archival quality print. Special relief to deposit a black and white videotape will be granted only where a celluloid print is demonstrably unavailable. Given the previously noted representations of the colorizers regarding their acquisition or

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[3] See Hearing on Colorization Before the Subcommittee on Technology and Law of the Senate Judiciary Committee, May 12, 1987 (statement of Roger L. Mayer, President, Turner Entertainment Co.) (statement of Rob Word, Senior Vice President, Creative Affairs, Corporate Officer, Hal Roach Studios, Inc.) (hereafter "1987 Senate Hearing").

[4] The gaps in the Library's collection exist primarily with respect to 1930's and 1940's films. Before the introduction in 1942 of the special contractual arrangement, known as the Motion Picture Agreement, many films were not registered; the films could not be acquired through the demand deposit provisions of the Copyright Act of 1909 because the films were arguably unpublished under that former law. Contrary to the assertion of one commentator, the Motion Picture Agreement has been a vehicle for filling gaps in the collection and is not the cause of the gaps.

[5] 1987 Senate Hearing, Statement of Rob Word.

[6] RM 88-10, Comment 9.

development of archival-like quality black and white prints, we would expect that ordinarily special relief is unnecessary.

4. Related Issues

(a) *Availability of the Motion Picture Agreement.* One comment requests clarification of whether a form of the Motion Picture Agreement will be available for black and white deposits. The Motion Picture Agreement does not apply to these deposits. The Agreement was developed to encourage timely registration of a motion picture without requiring the registrant to keep a print out of circulation at the very time that the motion picture was being exhibited for the first time. Such a consideration does not exist here where the registrant is planning primarily to exhibit the colorized videotape version.

Moreover, the Library intends to select all black and white prints received under this regulation. If the Motion Picture Agreement were available, this would lead to unnecessary back and forth transportation of prints between the Library and the depositor.

The Motion Picture Agreement is currently available in the case of the colorized videotape version.

(b) *Applicability of "best edition".* One comment requests confirmation that the Best Edition Statement of the Library of Congress is inapplicable. The Library would prefer deposit of the black and white print in the order of preference listed in the Best Edition Statement. We recognize, however, that older works may not be available in certain gauges, and would request that the registrants make a good faith effort to deposit the best available film print, in particular a print that is clear, undamaged, undeteriorated, and free of splices. We understood that restoring or cleaning the black and white print before colorization involves preparation of an excellent quality print. If preservation of the black and white print is one of the benefits of colorization, the Library would expect that a "complete" black and white print will be deposited to achieve that benefit for posterity. Special relief is available, of course, if the requirement cannot be satisfied in a particular case, for example, where a black and white kinescope copy is colorized.

* * * * *

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress and is a part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (title 5 Chapter 5 of the U.S. Code, Subchapter II and Chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since that Act affects only those entities of the Federal Government that are agencies as defined in the Administrative Procedure Act.[4]

[4] The Copyright Office was not subject to the Administrative Procedure Act before 1978, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (i.e., "all actions taken by the Register of Copyrights under this title [17], except with respect to the making of copies of copyright deposits). [17 U.S.C. 708(a)]. The Copyright Act does not make the Office an "agency" as defined in the Administrative Procedure Act. For example, parochial policies taken by the Office are not subject to APA-FOIA requirements.

List of Subjects in 37 CFR Part 202

Claims, Claims to copyright, Copyright registration.

Final Regulation

In consideration of the foregoing, the Copyright Office is amending Part 202 of 37 CFR, Chapter II.

1. The authority citation for Part 202 continues to read as follows:

Authority: Copyright Act, Pub. L. 94-553, 90 Stat. 2541 [17 U.S.C. 702].

2. Section 202.20(c)(2)(ii) is amended by adding the following sentence at the end thereof:

§ 202.20 Deposit of copies and phonorecords for copyright registration.

* * * * *

(c) * * *

(2) * * *

(ii) *Motion pictures.* * * * In the case of colorized versions of motion pictures made from pre-existing black and white motion pictures, in addition to the deposit of one complete copy of the colorized motion picture and the separate description of its contents as specified above, the deposit shall consist of one complete print of the black and white version of the motion picture from which the colorized version was prepared. If special relief from this requirement is requested and granted, the claimant shall make a good faith effort to deposit the best available, near-archival quality black and white print, as a condition of any grant of special relief.

* * * * *

Dated: July 28, 1988.

Ralph Oman,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 88-17089 Filed 8-4-88; 8:45 am]

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The Financing of Motion Pictures

In this attachment, Mr. Schwartz describes how motion pictures are financed -- who bears the burdens of the financial risks and under what conditions.[1] Although not central to our assignment, this topic bears importantly on the environment in which the parties must operate. Many of the parties involved today in film financing are new, but today, as always, motion pictures are still prepared as works made for hire. The people who own the copyright are not necessarily the same people who bear the financial risks in a work. This fact of copyright ownership does, however, explain who has the basic creative control over the work itself, and any subsequent derivative works, outside of any formal contract specifying creative control.

The courts have applied contract principles to interpret the rights retained by creative artists or the rights assigned by the copyright owners. "Once the rights of ownership are transferred by the original filmmaker, the copyright statute will not protect the integrity of the original film, unless the filmmaker provides for protections in the contract."[2]

Of course, under the traditional copyright principle of the divisibility of rights, the right to exploit a work for other markets--markets created by the techniques of colorization, panning and scanning, or

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[1] For a full discussion of these issues See Jason E. Squire, The Movie Business Book. Simon & Schuster, Inc. (1983), which is a collection of 42 essays about the movie business written by individuals in the industry.

[2] Elise K. Bader, A Film of a Different Color: Copyright and the Colorization of Black and White Films, 5 Cardozo Arts and Entertainment, 497, 531.

lexiconning -- can be contracted for without regard to the integrity of the original work. In the case of motion pictures, sometimes as many as five hundred prints are issued for the first theatrical release, and it is possible for all five hundred to be of different lengths and variations within a year, due to editing and post-production changes in the various theaters, not to mention the different copies owned or leased by television studios and the various videocassette formats offered for sale or rental.

The financing of motion pictures is risky in an investment sense--most films lose money. Producers argue that since they take the brunt of the financial risks, they should generally own the rights to exploit the works using every available technology in every available marketplace.

The Producer and the Economics of Filmmaking

The role of a film producer has become somewhat blurred today because, in part, there are so many different ways of crediting production functions in a film including: "produced by," "presented by," "executive producers," "associate producers," and "executive in charge of production." All of these terms have no meaning without understanding what role the individual or company plays, whether this "producer" is a financial arranger and investor, or a packager of creative material with the artists, directors and studios all pre-arranged, or an agent of the film's star, or something else altogether.[3]

Basically, there are five stages of picture making: research and development, pre-production, production, post-production and marketing.

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[3] William Goldman, Adventures in the Screen Trade, 1983, page 60.

The difference between the "pure producer" and the "packaging producer," is how far along in this process the producer continues to maintain a financial risk.[4]

Since it is too difficult to describe the whole array of possible roles a producer might have, what follows is a somewhat traditional explanation of the functions and financial risks incurred. In most instances, the producer starts work on a film project (the research and development stage) with the purchase and clearance of copyrighted material in the form of a book, a screenplay or a treatment (a long synopsis of the events of a story). This can be done either by purchasing or optioning the material from the author or screenplay writer.[5] In some instances, a well-known screenwriter can enter into a partnership with the writer and jointly negotiate with the producer for a share of his profit.

> Under such an arrangement, the writer takes a risk along with the producer, but he also stands to be rewarded along with the producer if they're successful. This doesn't mean that the pooling and division necessarily result in a 50/50 split. It could be 66/33, 75/25, 60/40, or some other percentage. But the pooling and division partnership has become a rather frequently used device to accomplish a deal between a producer and a writer or the owner of a piece of material when

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[4] Robert Evans, The Producer contained in ibid. Squires, page 14.

[5] Options are usually for a period of time, for example one year, with a renewal period, often an additional year, after which the author/screenwriter can sell his work to another buyer if the purchaser of the option doesn't exercise the option. The second year of the option is usually necessary to give the producer time to start the production and to secure financing. How much money the author/screenwriter gets for the option depends of course on the material itself, the reputation and success of previous works by this author etc. Usually, there is a cash payment for the option and a bonus if the option is exercised. The latter provision is either in the form of cash and/or a "back end" deal to provide a percentage of the picture's net profits to the writer. From Norman H. Garey, Elements of Feature Financing, contained in ibid. Squire, pages 96-106.

> the producer doesn't want to lay out a lot of money and the writer doesn't want to accept short money up front without a commensurate back-end reward for doing so.[6]

Work for hire development deals are the most common methods for producers to hire screenwriters, either paying the writer with the studio's development money or with the producer's own money. Often the writer will be paid more than the Writers Guild minimum by giving the writer a large cash fee and a share of the profits and a share of the subsidiary or separated rights (such as theatrical and television sequel, print-publishing, and merchandising rights).[7]

After the copyrighted material is obtained and cleared and the screenwriter is paid, the producer must obtain production financing to begin developing the picture. The producer can act as a packager of the creative material (consisting of the script and the rights), and of the creative talent (actors and/or director) and sell the package deal to the financier, either an independent production company or a major studio.[8] Or the producer can create a "mini-package" consisting of the script, rights, and producer's services and sell that to the studio. The studio then must hire the director, the actors and actually shoot the picture and take the development risk (that the picture will even be made at all) based on what they purchase, which is a script and the copyright to the script plus any other production services the producer is selling.

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[6] Ibid., Garey contained in Squire, page 97.

[7] Ibid. Garey/Squire page 98.

[8] The difference between these two entities is that only the major studios have distribution arms, which is necessary to get every film from the production/post-production stage out to the general public.

> The further a producer has moved the project--that is, the greater the investment he has made in terms of time, effort, and money and the more finished the product he is delivering -- the more he's going to get for it both in cash and in back-end contingent interest. If he's in a position to bring in what is nearly a completed movie that just hasn't been shot yet, he's going to be able to make the best deal with the financier. However, there are some risks to this approach, both strategic and financial.[9]

All the activities that proceed the actual setting of a starting date are part of the research and development stage. Once they set a start date for shooting the pre-production stage begins.[10] One of the highest financial risks for producers in film production is the completion guarantee -- actually getting a picture made after beginning the development deal.

> A completion guarantor is a kind of cost insurer, or insurance company. He agrees (for a premium usually computed as a percentage of the picture's production costs) that out of his resources or financial contacts, he will guarantee the money necessary to complete the picture if the money that has been raised from other sources turns out to be inadequate; for example, if the picture runs well over the original budget.[11]

The longer the producer stays in the process and guarantees completion the more financial rewards he or she is entitled to, including copyright ownership. Generally, if the producer simply packages the deal, then signs a contract with a studio to have the studio actually make the picture, with the producer providing personal services, the studio will own the copyright. This is the case with a "packaging producer," who is in a

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[9] Ibid. Garey/Squire at page 99.

[10] Ibid., Evans contained in Squire, page 16.

[11] Ibid., Garey contained in Squire, page 100-101.

work made for hire agreement with the studio/copyright owner.

If however, the producer acts as a "pure producer" and continues to make the picture with independent financing, renting equipment, hiring the actors -- generally financing both "above the line" and "below the line" costs,[12] then the producer will own the copyright and will then have to assign the rights to the distributor. Here the producer is at great risk, assuming all of the production costs, and he or she is rewarded with copyright ownership. He or she will be able to make more money, however, by negotiating for ancillary rights, including the soundtrack album and publishing rights to the film's music, merchandising rights, and any book publishing rights associated with the film. The risks involved in filmmaking have increased for producers and studios as fewer pictures make profits and as costs rise. For example, "below the line" costs have tripled since 1967.[13]

The actual production costs of a film include studio overhead, which is computed as a percentage of the total production costs. The amount is charged by the studio for the costs of producing the film itself and must be

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[12] Above the line costs are: the fixed costs of the key creative costs prior to the beginning of shooting, including the personnel costs (and all travel expenses for location pictures) for the producers, writers, actors, directors and the purchase costs of the story and other rights connected with the acquisition of the underlying literary material including the screenplay costs. Below the line costs are: the costs incurred in physically making the picture including all the other personnel and materials. Usually, below the line is broken down into three sections, production period, post-production period, and "other charges." From Paul Maslansky, The Line Producer contained in ibid., Squire, page 209.

[13] Ibid., Evans contained in Squire, page 16.

figured into the film's budget.[14] On independent pictures (i.e., not made by studios), there is no overhead charge but, instead, a charge for the rental of all the studio facilities and services (usually charged on a per studio day basis).

The production stage concludes when filming is completed. Next comes the post-production stage involving the editing of the film, the scoring of music and the synchronizing of sound, and finally the making of prints for distribution into theaters. The director, by contract, has the right to edit the film and turn in his version, known as the "Director's Cut." After that, the producer can edit the film into its final version usually in some collaborative effort with the director and editor. As producer Robert Evans says,

> In post-production, I work most closely on the editing. It's taken me many years to build respect with directors and editors, and this, too, is very much a collaborative effort. The director has the prerogative to mold and shape the film in his cut. Then, I work with him and the editor to fine tune the editing process, which is critical to the form and impact of the final picture.[15]

The fifth and final stage of filmmaking is the marketing stage, which involves the advertising and distribution of the picture. For distribution a major distributor (all the major studios have distribution arms) must be used to make the "teaser" (the coming-attractions) for theaters and television, to organize the print advertising campaigns, to set the dates,

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[14] "It covers services from preparing legal contracts, researching copyrights, making out payroll and accounting for production and distribution to simple janitorial and maintenance services. Most studios also provide cameras, lights, grip equipment, editorial and transportation equipment, offices, and projection facilities for the overhead charge." From Roger L. Mayer, Studio Operations, contained in ibid., Squire, page 159.

[15] Ibid., Evans contained in Squire, page 18.

terms and theaters for release of the picture, to make foreign language copies (dubbed or subtitled), to preview the film, and finally, open the film. Because of the huge risks and expense involved in distribution, a large percentage of the films costs, including returned profits, goes to the distributor. The domestic box-office gross on all films released in 1980 was over $2.7 billion, and the costs of marketing films was about 25 percent of that or a little over $700 million, which includes advertising, promotion, and market research.[16]

> The more studio money the producer accepts and the earlier he accepts it, the greater the risk he asks the studio to take and the more the studio will expect to be rewarded for it. Again, the risk/reward ratio operates. If the financier-distributor is asked to take the entire production risk, the best the producer can expect -- assuming he's assembled all the elements and has paid the entire development cost -- is usually a 50/50 net profit deal. For that much risk, the financier-distributor is generally considered to be entitled to at least 50% of the net profits, and perhaps more, and to insist on the standard distribution fee of 30% for the U.S. and Canada.[17]

For all of the risks associated with the making of motion pictures, the producer usually ends up with 10-20 percent of the net profits and often less after paying for profit participation by others, especially the distributor and the creative participants, including the writer and the director and, in some cases the star.[18] Of course, because of the producers role in making a motion picture, and because of the financial risks he or

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[16] Richard Kahn, Motion Picture Marketing, contained in ibid., Squire, page 264 and 270.

[17] Ibid., Carey contained in Squire, page 103. An excellent example of the breakdown of profits is provided at the bottom of page 103 continued on page 104.

[18] Ibid., Garey contained in Squire, page 103.

she takes, "pictures with runaway costs can be traced to negligent producers or financing sources."[19]

The Director, Screenwriter and Other Creative Participants

> Making a movie is analogous to building a building on a lot. The literary property is the lot, the piece of real property. The movie is analogous to the building. The screenwriter is the architect, the director is the contractor, and the producer is theoretically the owner. The major studio (if one is involved) can variously represent a lending institution, equity partner, and/or leasing agent for the finished building (in its capacity as distributor).[20]

The director is hired by the producer (or by the studio if it is the producer) in most cases as an employee in a work made for hire situation. The director signs a service contract and gets a flat fee and may also receive net profit participation.[21] Many actors and directors also get "holding money" or option money. Since star actors and directors will not agree to undertake a project in development unless they are certain they get

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[19] Ibid., Evans contained in Squire, page 15. For additional information on the financial and accounting practices in the motion picture industry, see ibid., Vogel, Entertainment Industry Economics, chapter 4, especially part 4.4, beginning at page 101. Vogel describes the production-financing-distribution (PFD) agreements used by most producers, participation deals (including "pick-ups" of incomplete projects), and producers' participation and cross-collateralization deals which are used in the industry today.

[20] Ibid., Garey contained in Squire, page 102.

[21] "There may be half a dozen directors in the world who command first dollar gross participation of a significant kind, and hardly any writers who can. However, there are many actors and directors, and even a few writers, who are given gross participation from break-even, that is, once break-even is achieved." From Garey contained in Squire, page 105. In addition, directors, writers and actors get fringe benefits under their guild contracts which can add as much as 20% to the labor costs of making a picture. From Paul Maslansky, The Line Producer, contained in Squire, page 209.

compensated, they are paid this money to pledge their availability.

By signing net profit participation schemes (and, only very rarely, gross profit arrangements), directors, like producers, share the risk of financial failure on the pictures they direct. But, in most cases, they are compensated primarily as employees under work made for hire arrangements so they are paid whether or not the picture is a success. But damage to their reputation can have severe economic consequences for the future of their directorial careers. Operating as Hollywood does under the motto -- "You're only as good as your last picture" -- directing a bad picture can have severe career consequences.

If the commercial failure of a picture is blamed on a pre-production or production problem such as a poor script or a low budget, the director has no one to blame but himself or herself, since they agreed by contract to the script and budget and the actual filming when they signed onto the project. But post-production changes, only provide for minimal rights of "consultation" (though the directors have agreed to this consultation right by contract)[22] for any editing, colorization, panning and scanning, or lexiconning which the producer/copyright owner agrees to. Worse yet, a poor or nonexistent marketing scheme on a picture can ruin its financial chances. Obviously, if the picture is going to be a commercial success, the studio marketers know it and will spend the money on it. But often the directors bear the brunt for failures. In a just world they might share the blame with the producers, but most often the finger of blame points at them. Often the directors of today "function as their own producers, though they

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[22] Article 7, 1987 Agreement of Basic Minimum Rights between the Directors Guild of America and the Alliance of Motion Pictures and Television Producers.

are not credited as such."[23] This is because of the fact that many "producers" are simply business dealmakers with no creative experience--and this vacuum must be filled by the director.[24]

Screenwriters have even fewer financial risks than directors and have even less influence in the creative process. Usually they are compensated, often well compensated, up front, bearing few of the financial risks of picture-making, unless they participate in profit participation agreements. William Goldman, a well-known screenwriter says that screenwriters are not supposed to have collaborative powers in creating films. "Long ago, Hollywood decided that the way to keep people quiet is to overpay them. An author paid all that money should go home and count it and be content."[25]

According to Goldman, only the well established screenwriters have the power to influence the details of the production of a film.

> Generally, the answer is that the writer gets as close to the production as his director allows. The production is really the director's baby. If he has faith in the author's judgment, the director will be more willing to tolerate his presence during filming. If the director doesn't want him, there is nothing the writer can do about it.[26]

Goldman says that an author is "blessed" if the director is interested in working with him in production (and pre-production). The situation for screenwriters is very different than for playwrights.

> The motion picture producer acquires all rights necessary to alter or change the screenplay in any

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[23] Ibid., Sydney Pollack, contained in Squire at page 28.

[24] Id.

[25] William Goldman, The Screenwriter, contained in ibid., Squire at page 58.

[26] Id., page 59.

> manner which he feels is appropriate and ... requires the writer to waive rights of 'droit moral.' Except in rare instances, he will be authorized to produce the picture using any directorial, acting and other talent which he determines. Conversely, the producer of a play generally acknowledges that the play is an artistic creation of the author and agrees that the author is entitled to approval over the cast and director, and when appropriate, conductor and dance directors. Further, once the completed script has been delivered, no addition, alteration, or omission may be made without both the author's and producer's consent.[27]

Compare this situation to what director and screenwriter Mel Brooks says in acknowledging the different amounts of creative control his different roles afford him. "I direct a film to protect the writing. I produce a film to have total business control as well as creative control over the film's future."[28]

For screenwriters, as with directors, however, once they lose control -- whether creative or commercial -- they feel powerless to salvage the work or their reputation. Goldman says that when Butch Cassidy and the Sundance Kid, for which he wrote the screenplay, opened in New York, the reviews in the three daily papers were split -- "two terrific, one pan. In neither of the laudatory reviews was my name even mentioned. But you better believe I got top billing in the pan. I had screwed up [director] George Hill's

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[27] Michael I. Rudell, Behind the Scenes: Practical Entertainment Law, Law & Business, Inc., (1984), page 123. According to Rudell, since movies rarely make money, profit participation agreements are of little value to screenwriters, while playwrights, often sharing in gross box office receipts often profit handsomely (so long as the play is running). Id., page 124.

[28] Mel Brooks, My Movies: The Collision of Art and Money, contained in ibid., Squire at page 36.

movie."[29]

If producers take the primary financial risks, then directors and writers primarily take reputational risks. The producer is most worried about completing a picture and he or she gambles on the creative participants to do this. Returning to the building metaphor, one commentator has compared a director to a general contractor. "He's responsible for building the building, and if the costs are going to run over, it'll probably be because of him."[30]

All of the other creative talents -- the cinematographer, editor, art director and the "crew" -- are employees for hire paid under service contracts for single pictures, or multiple service contracts. Because films are by nature "research and development products ... they are perishable and cannot be test marketed in the usual sense."[31] Since most of the creative talent, including the directors, screenwriters and "below the line" employees, are paid as employees, their share in the financial risks is reduced considerably. Only for directors and screenwriters with profit participation agreements are the rewards for financial success tied to the picture's success. But the downside is that these two creative artists share in the reputational hazards of unsuccessful pictures as well. The increase in other financial markets, such as the videocassette market, and twenty years ago, the television market, has rewarded the producers more than any other participants in filmmaking. But the directors and

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[29] William Goldman, Adventures in the Screen Trade, Warner Books, 1983, page 79.

[30] Ibid., Garey contained in Squire at page 101.

[31] Harold L. Vogel, Entertainment Industry Economics: A Guide for Financial Analysis, Cambridge University Press (1986), page 89.

screenwriters share in the profit-making from these other markets, especially television.[32]

In sum, the directors, arguing for all creative artists, said, "it is not entrepreneurs alone that rely on the developed systems of publishing, marketing, licensing, reproducing, and syndicating artistic materials. Artists rely on these systems, too."[33] And artists clearly have a stake in the economic well-being of the industry upon which they depend for their livelihood, and generally can be relied on to act accordingly.

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[32] In 1960 four guilds (the Directors Guild of America, Screen Actors Guild, Writers Guild of America and the American Federation of Musicians) signed collective bargaining agreements with the Association [now called the Alliance] of Motion Picture and Television Producers which waived the guild's rights to revenues in theatrical motion pictures made prior to 1960 and released on free television. In exchange each of the guilds was given a cash settlement for the establishment of pension plans for their members. For theatrical motion pictures made since 1960, which are released on free television, the guilds divide up a total of 12 1/2% of the gross revenues from those pictures (the guilds share is: 1.2% each for the DGA and WGA, 3.6% for the SAG, 1% for the AFM and 5.4% for the International Alliance of Theatrical and Stage Employees (IATSE).

[33] Statement of the Directors Guild of America before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, September 30, 1987, page 6, reprinted in the Directors Guild of America prepared statement for the Copyright Office hearing of September 8, 1988, docket RM 88-3, comment letter 8, August 24, 1988.

Mr. OMAN. Thank you very much.

In the report, as you know, we made several recommendations.

First, we recommended that Congress should seriously consider a unified Federal system of moral rights. That solution would lead to uniformity and certainty for works that are disseminated nationwide. That unified Federal system does not have to grant rights any higher than now exist under State, Federal, and common law; but of course, if that was your decision, they could be higher.

Second amongst the recommendations in the report, we said that if you opt for a unified Federal system of moral rights, you should partially exempt State moral rights protection. Preemption should apply to rights that are equivalent to those granted in the Federal statute but not to other rights that the States may decide to grant.

Third, if you prefer an industry-by-industry approach to moral rights rather than a unified Federal system, I would recommend that in the case of motion pictures you look at the existing web of collective and individual bargaining to determine whether or not this system is adequate to protect the legitimate interests of the directors and other creative artists. In fact, Mr. Chairman, I understand that the issues that we are discussing today have been put on the bargaining table by the parties for this upcoming round of contract negotiations, and this may be a way of handling the problem.

Fourth, if you choose to grant a higher level of moral rights than now exists in the motion picture industry, I could support this effort in principle, but I think that all of the reasons for additional moral rights in the motion picture industry apply with equal force to other forms of authorship where collective bargaining is not as strong. I am thinking about the case of visual artists and some aspects of the publishing industry.

Finally, Mr. Chairman, if you decide to enact additional moral rights legislation, I would have a list of issues to warn you about, land mines that may lie in your path. I will submit those for the record.

I would be pleased to answer any questions you may have. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Oman and followup questions and answers follow:]

SUMMARY
STATEMENT OF RALPH OMAN
REGISTER OF COPYRIGHTS
October 24, 1989
"MORAL RIGHTS AND THE PERFORMING ARTS"

Since this is the third hearing held by the Subcommittee this session regarding moral rights, I will not regale you with comments about the moral rights of attribution and integrity, but will focus on two subjects: my recommendations to the Congress about technological alteration of motion pictures, as found in my 1989 colorization study, and my assessment of the key legislative issues you may want to address in considering any additional moral rights legislation.

Congress took a step in favor of preservation of motion pictures by passing the National Film Preservation Act of 1988. The Librarian of Congress announced the first list of 25 films to be protected against material alteration last month.

If film directors had a moral right veto power over the colorizing of black-and-white motion pictures, that does not necessarily mean no films would be altered.

Regarding technological alteration of motion pictures, I make these recommendations:

(1) Congress should seriously consider a unified federal system of moral rights.
(2) If a unified federal system of moral rights is adopted, state moral rights protection should be partially preempted.
(3) In the case of the motion picture industry, Congress should look at the existing web of collective and individual bargaining to determine whether this system is adequate to protect the legitimate interests of directors and other creative artists.
(4) If Congress chooses to grant a higher level of moral rights than now exists in the motion picture industry, I suggest that other forms of authorship are equally deserving of protection.

If Congress decides to enact additional moral rights legislation, I suggest you consider the following points:

What kinds of works will be accorded moral rights protection--all copyrightable subject matter, or specified categories?
Who are the beneficiaries of these additional rights? Should employer-authors of works made for hire be given moral rights? Should works for hire be excluded from additional moral rights protection?
Should the same rights of attribution and integrity be extended to all moral rights beneficiaries?
If the integrity right is based on damage to the author's honor or reputation, what are the standards of proof to establish such an injury?
What exemptions or limitations should be attached to the additional moral rights? Should they be subject to a fair use limitation?
Alienability and waivability. Should the new moral rights be transferrable? Should they be waivable?

STATEMENT OF RALPH OMAN
REGISTER OF COPYRIGHTS
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS, AND TRADEMARKS

SENATE COMMITTEE ON THE JUDICIARY
101ST CONGRESS, FIRST SESSION

October 24, 1989

"MORAL RIGHTS AND THE PERFORMING ARTS"

I am Ralph Oman, Register of Copyrights in the Library of Congress. Thank you for the opportunity to testify on one of the more interesting, if controversial subjects before your subcommittee. [1] Today, I am not here to talk about any specific pieces of legislation pending before the Senate. Instead, I have been asked to discuss the general subject matter known as "moral rights," as it relates to works of the performing arts. I will focus my comments on motion pictures and summarize the colorization study I filed in March of this year.

I. MORAL RIGHTS OVERVIEW

Moral rights are recognized as non-economic rights under Article 6bis of the Berne Convention, and are "independent" of economic rights. They have been described by one commentator as "manifestations of the author's personality." These rights give rise to an interest deserving of protection because they are indeed the embodiment of the author in his or her work.

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1 This statement is based on my Report to Congress on Technological Alterations To Motion Pictures and Other Audiovisual Works: Implications For Creators, Copyright Owners, and Consumers (hereafter, The 1989 Colorization Study), March 1989.

This concept applies, of course, to all authors -- whether writers, painters, sculptors, or composers.

The Ad Hoc Working Group on U.S. Adherence to the Berne Convention, made up of private sector attorneys who met under the auspices of the State Department, studied the compatibility of U.S. law with the Berne Convention.[2] The Ad Hoc Group identified four general categories of moral rights: (1) the right of publication; (2) the right of recall; (3) the right to claim or disclaim authorship (also known as the right of paternity or attribution); and (4) the right to protect the integrity of the work.

Because the rights of attribution and integrity are enumerated in Article 6bis of the Paris text of the Berne Convention, to which the U.S. adhered on March 1, 1989,[3] these rights have been the recent focus of legislative initiatives and discussion. The Ad Hoc Working Group determined that Article 6bis does not explicitly grant a right of recall, that is, the right to insist that a work be withdrawn from circulation. The fourth right identified by the Ad Hoc Group, that of first publication, is protected by copyright law as one of the exclusive rights in section 106. [4]

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2 Final Report of the Ad Hoc Working Group on U..S. Adherence to the Berne Convention, Hearings Before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Judiciary Comm., 99th Cong., 1st and 2d Sess. 460 (1986) (hereafter, Ad Hoc Working Group Report).

3 The United States has been a member of the other international copyright treaty, the Universal Copyright Convention since 1955. This convention does not require moral rights protection.

4 For a further discussion of the exclusive right of first publication under 17 U.S.C. Sec 106(1), see Harper & Row, Pub., Inc. v. Nation Enterprises, 471 U.S. 539 (1985).

The right of attribution is the right of the author to claim or disclaim authorship in a work. According to the WIPO Guide to the Berne Convention, [5] an author can exercise the right even in a negative way, by using a pseudonym or remaining anonymous. Further, the author can change his or her mind about claiming or disclaiming authorship, and can refuse to have his or her name applied to a work.

The right of integrity concerns the ability of the author to defend against or seek redress for distortion, mutilation, or other unauthorized modifications of his or her work that are prejudicial to the artist's honor or reputation.

Before discussing the right of integrity further, let me say a few words about the destruction of works. The general view of commentators is that destruction of a work is not a moral rights violation. [6] Moral rights under European theories are rights personal to the author and are intended to protect the personality and integrity of the author, not necessarily the work itself. Some commentators criticize the absence of a destruction right in most moral rights jurisdictions. [7]

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5 World Intellectual Property Organization (W.I.P.O.) Guide to the Berne Convention for the Protection of Literary and Artistic Works 41 (1978).

6 Cf. The Fountain of Roussillon, April 3, 1936, Dalloz Periodique, 1936, 3.57 (France). In those countries where the right to withdraw works from circulation is recognized, the author may seek to invoke the right in order to destroy the copies. This right is quite separate from any right of destruction.

7 Where the destruction right does exist, it generally relates to works included as part of buildings.

The two separate rights of integrity and destruction should not be confused. They have distinct purposes -- the former protects the personality of the author, while the latter protects the work itself. This is a preservation right. While there is nothing to prevent Congress from incorporating a destruction right into additional artists' rights legislation, the purposes underlying these rights are separate and distinct.

Let me now quickly highlight the current status of moral rights under United States law. In adhering to the Berne Convention, Congress decided to follow a minimalist approach regarding the need for changes in our copyright law. Additional moral rights were not enacted because the Congress determined that current federal, state, and common law provided sufficient protection for moral rights to meet the test of Article 6bis of the Berne Convention. The Ad Hoc Group reached the following conclusion in its final report:

> Given the substantial protection now available for the real equivalent of moral rights under statutory and common law in the U.S., the lack of uniformity in protection of other Berne nations, the absence of moral rights provisions in some of their copyright laws, and the reservation of control over remedies to each Berne country, the protection of moral rights in the United States is compatible with the Berne Convention. [8]

Congress adopted this interpretation of United States law and passed the Berne implementing legislation by votes of 420-0 in the House and 90-0 in the Senate. Additional moral rights protection must be justified on its

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8 Ad Hoc Working Group Report, supra note 2 at 460.

own merits rather than on complaints about "noncompliance" by the United States with Article 6bis of the Berne Convention.

The Ad Hoc Group's report acknowledged that there are no explicit moral rights provisions in United States copyright law, but pointed out two analogous sections of the Copyright Act: section 106(2), the right to prepare derivative works, and section 115(a)(2), the mechanical license for phonorecords, which allows the making of a musical arrangement of the work "to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work...."[9] The Ad Hoc Group also identified the Lanham Act, state statutes, and state and federal decisions "protecting various rights equivalent to those granted in Article 6bis under state common law principles," including contract, unfair competition, tort, libel, and right of privacy/publicity.

I will not detail the case law, and instead refer you to Chapter 5 of the Copyright Office's 1989 Colorization Study on moral rights in the motion picture industry. Most of the case law is directed toward the right to claim authorship or to object to the misattribution of authorship. Only a few U.S. cases have examined the possibility of relief under the Copyright Act for violations of the right of integrity, the most famous of which is Gilliam v. ABC, 538 F.2d 14, 27 (2d Cir. 1976). In this so-called Monty Python case, the substantial reediting by ABC was found to violate contractual rights and to impair "the integrity of the appellant's work ...

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9 One may question whether these examples are, in fact, analogous to moral rights since they may be freely alienated and do not exist independent of the (economic) right they represent.

[by representing] to the public as the product of the appellants what was actually a mere caricature of their talents...." This case, however, appears to turn on the scope of rights granted under a contract and thus did not present the issue squarely.

In addition to case law, ten states have passed legislation granting limited moral rights for a limited class of works, principally works of the fine arts (paintings, sculptures and drawings). The states are: California (the broadest reaching state law), Connecticut, Louisiana, Maine, Massachusetts, New Jersey, New Mexico, New York, Pennsylvania and Rhode Island. Almost all of these exempt works made for hire and motion pictures, and provide limited rights of integrity.

II. THE COLORIZATION ISSUE

Let me now turn to the legislative proposals of the last few years regarding alterations of motion pictures and to the Copyright Office's colorization study.

While considerable attention has focused on the computer colorization of motion pictures, directors and other creative film artists object vociferously to other alterations of motion pictures made for post-theatrical release, i.e., for television, cable, and videocassette distribution, including: editing of films for television, "lexiconning" or time compression (speeding up or slowing down of films), and "panning and scanning"--adaptations of films to convert images conceived for the wide theatrical screen to smaller-size television screens.

By custom and practice, theatrical motion pictures are typically works made for hire, with the copyright being held by the producing entity, usually the film studio, and not by the directors or other creative artists who contributed to the creation of the work. The right to alter the works belongs to the copyright owner under section 106(2) of the Copyright Act. The copyright owner can authorize the creation of derivative works, such as colorized copies or adaptations for television, without the approval of the creative contributors to the film. The Copyright Office will register derivative works, including computer color-encoded versions of black and white motion pictures that meet the standard of originality applied to all works.[10]

The colorization process only involves videotapes, not the original film print; the process of colorization involves transfer of the images contained in the black and white film print to a black and white videotape. It is this videotape that is colorized -- the film print remains untouched and unaltered.

Directors and other creative artists argue that independent of ownership of the copyright, they should be accorded both attribution and integrity rights in order to prevent unauthorized alterations of motion pictures. The motion picture producers have agreed to bargain collectively with the directors in the future about colorization, time-compression, and panning and scanning.

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10 52 Fed.Reg. 23443-23446 (June 22, 1987).

A. National Film Preservation Act.

Congressman Gephardt introduced a bill in the 100th Congress, H.R. 2400, the Film Integrity Act. It would have amended title 17 by adding a new section 119, which would have prevented any published motion picture from being "materially altered," including computer colorization, without the written consent of the "artistic authors" of the work. The "artistic authors" were defined in this bill as the principal director and screenplay writer.

Instead of enacting the Gephardt bill, Congress adopted an amendment in the Interior Department Appropriations Act for fiscal year 1989, which created the National Film Preservation Board within the Library of Congress. The amendment, sponsored by Representatives Mrazek and Yates originally would have prevented colorization. The amendment was substantially weakened due to opposition from copyright owners and users.

When enacted, in September 1988, as Public Law 100-446, [11] the National Film Preservation Act created a National Film Preservation Board within the Library of Congress for 3 years. (All the provisions of the Act will sunset after 3 years unless Congress reenacts them.) Under the law, the Librarian of Congress, in consultation with a 13 member Board made up of private sector organizations that are designated in the law, selects up to 25 films

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11 For a thorough discussion of the legislative history of this Act, see Schwartz, "The National Film Preservation Act of 1988: A Copyright Case Study In The Legislative Process," 35 Journal of the Copyright Society of the U.S.A., 138-159.

a year for inclusion in the National Film Registry within the Library of Congress. [12]

Films selected for inclusion in the Film Registry receive a seal (designed for the Librarian by the distinguished artist Saul Bass) which can be used to promote the designated films. The Film Board must meet at least twice a year by law. In making its selection of 25 films this year, the Board received the names of 962 films submitted by the public for consideration. Final selections were made by the Librarian in September, 1989. The labeling guidelines will be issued by early 1990.

Films cannot be selected for inclusion in the Film Registry until 10 years after they have been theatrically released. There are no other restrictions on the films that can be selected, except that they must meet the very broad congressional guidelines of films that are "culturally, historically, or aesthetically significant." Therefore, the list does not have as its objective the selection of the nation's "best" films.

Films selected that have been colorized or materially altered can be included in the Film Registry, but they must be labeled to disclose such colorization or alteration. "Material alteration" means "to colorize or to

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12 The 25 films selected for inclusion in the National Film Registry for 1989 are: The Best Years Of Our Lives (1946); Casablanca (1942); Citizen Kane (1941); The Crowd (1928); Dr. Strangelove (or, How I Learned To Stop Worrying And Love the Bomb) (1964); The General (1927); Gone With The Wind (1939); The Grapes Of Wrath (1940); High Noon (1952); Intolerance (1916); The Learning Tree (1969); The Maltese Falcon (1941); Mr. Smith Goes to Washington (1939); Modern Times (1936); Nanook Of The North (1922); On The Waterfront (1954); The Searchers (1956); Singin' In The Rain (1952); Snow White And The Seven Dwarfs (1937); Some Like it Hot (1959); Star Wars (1977); Sunrise (1927); Sunset Boulevard (1958); Vertigo (1958); The Wizard Of Oz (1939).

make other fundamental post-production changes in a version of a film for marketing purposes but does not include changes made in accordance with customary practices and standards and reasonable requirements of preparing a work for distribution or broadcast." In addition, standard "practices such as the insertion of commercials and public service announcements for television broadcast" would not fall within this definition. [13]

The label for colorized or materially altered films is specified by the National Film Preservation Act and must be contained on all copies of the film, including videotapes, and packaging materials. Enforcement provisions are provided in the Act to prevent misuse of the Film Registry seal and to ensure proper labeling. The remedies are geared toward adding the proper labels before any criminal or civil penalties are sought. Finally, the Librarian is instructed to obtain, by gift, archival quality copies of all the films selected for inclusion in the Film Registry and to keep the films in a special collection in the Library of Congress available to the public. (The Library is now in the process of contacting the copyright owners of the twenty-five selected films in order to obtain archival quality material for the National Film Board Collection in the Library.) In carrying out its duties, the Film Preservation Board and the Library are working in cooperation with the archival and film communities.

B. Copyright Office 1989 Colorization Study.

The debate over moral rights, especially in the motion picture industry, was the most heated during Congress' consideration of the Berne

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13 Section 11 of the National Film Preservation Act.

implementation legislation. [14] In order to consider more fully the issues of colorization and moral rights, the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice asked the Copyright Office to undertake a study of the present and future use of technologies in the motion picture industry, including computer colorization, panning and scanning, and time compression. The Office also studied how these technologies affect consumers, artists, producers, distributors, and other affected individuals and industries. [15] Over the course of a year, the Copyright Office held a public hearing with 14 witnesses in September 1988, and consulted with creators and distributors of motion pictures, the broadcast industry, the computer colorizers, the creative artists and their guilds, archivists, and academics.[16] On March 15, 1989, the Office released its study to Congress. The report is now available to the public from the Government Printing Office.

The Copyright Office reached four major conclusions:

(1) Congress should seriously consider a unified federal system of moral rights. Such a system made sense for the same reasons that resulted

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14 See Berne Convention Implementation Act of 1987, Hearings on H.R. 1623 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee, 100th Congress, 1st and 2d Sess. (1987 and 1988); Berne Convention Hearings on S. 1301 and S. 1971 Before the Subcommittee on Patents, Copyrights and Trademarks, Senate Judiciary Committee, 100th Cong., 2d Sess. 523 (1988).

15 See, generally, the 1989 Colorization Study.

16 Id., Appendix II.

in the copyright revision of 1976 -- uniformity and certainty for works that are disseminated nationwide.

(2) If a unified federal system of moral rights were adopted, state moral rights protection should be partially preempted. Preemption should apply to rights equivalent to those granted in the amended federal statute but not to nonequivalent rights.

(3) If Congress prefers an industry-by-industry approach to moral rights, rather than a unified federal system, we made some suggestions for the motion picture industry. Looking at that industry, with its existing web of collective and individual bargaining, we said Congress should first determine whether this system is adequate to protect the legitimate interests of directors and other creative artists. Labor relations in the motion picture industry have a long history and do not present a situation where the economic leverage of the employers dwarfs that of the employees. Additionally, the Basic Agreement of the Directors Guild of America (DGA) represents only minimum rights; individual directors have negotiated above these requirements,[17] although the number who are able to gain substantial control over the final product and its post theatrical exhibition form is estimated to be only 5 percent.[18] If one can not bargain for the desired rights, the option still exists for the director to seek independent

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17 Of particular interest in this respect is the Turner Entertainment Company's February 14, 1989 announcement that it would not colorize Citizen Kane because of concern that the contract between RKO Pictures, Inc., Orson Welles, and Welles' production company arguably prohibited such alteration.

18 See testimony of Steven Spielberg, 1988 Senate Berne Hearings at 529.

financing of his or her film, a task which may be difficult, but which is certainly not impossible. For European directors, that practice is standard. There appears to be no restriction in the labor laws, even under the DGA's interpretation of them, on the DGA's ability to collectively bargain for precisely the rights they have sought from Congress. The fact that they have not obtained these rights may, perhaps, be ascribed to nothing more than the ordinary give and take of labor negotiations.

(4) If Congress chooses to grant a higher level of moral rights than now exists in the motion picture industry, the Copyright Office could support this effort in principle. The Office concluded, however, that the fundamental policy reasons supporting additional moral rights in the motion picture and television industries applied with equal force to all those who contribute expression to the motion picture.

We appreciate the directors' role as the single unifying force in the actual shooting of theatrical motion pictures; however, in insisting that only the principal director and principal screenwriter be accorded moral rights, we conclude that these other creators' contributions are being unfairly disregarded, in what is quintessentially a collaborative effort. It is one thing to be in charge; it is quite another thing to say that because you are in charge you are the only person entitled to any rights.[19]

Additionally, the rights of authors of preexisting works must be respected. This group includes novelists, short story writers, composers, and others whose existing works are later incorporated into motion pictures.

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19 We are aware that actors and actresses have expressed a willingness to place their rights in the "trust" of the directors. This is a fact Congress should consider should it find legislation desirable.

Directors have argued that these authors should have to rely on contractual protections for material alterations to their works in motion pictures. This position is fundamentally at odds with the directors' argument that they should not have to rely on contractual protections in their dealings with producers. The directors' assertion that the motion picture represents a different medium misses the whole point of moral rights: all artists should have the right to protect the integrity of their works. We fail to see how a material alteration in a different medium that injures the author's reputation is any the less worthy of protection. We find support for this proposition in the way many Berne member countries, including France[20] and Italy,[21] assimilate authors of preexisting works as co-authors of the motion picture, for economic and moral rights purposes. We also note a certain irony in the directors' reliance on France and Italy's treatment of unauthorized colorization as a violation of the author's moral rights, but their apparent unwillingness to accept the full consequences of those laws - the grant of moral rights to authors of preexisting works used in motion pictures.

The Office suggested that any legislation should accord rights prospectively, to works created on or after the effective date of the legislation. Otherwise, serious Fifth Amendment problems would arise with the placement of limitations on the rights of copyright owners of existing

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20 See Article 14 of the French Copyright Act.

21 See Article 44 of the Italian Copyright Law.

works in a manner that would inhibit effective exploitation of their property.

In the interest of resolving the debate over the colorization and other alterations to existing motion pictures, the Office recommended the establishment of a voluntary, industry-wide steering committee, apart from the collective bargaining apparatus, to adopt industry standards for such uses. This approach has been used in Italy, for instance, where, by agreement among broadcasters, copyright owners, and creative artists, films broadcast on television may have only limited commercial interruptions. Some films, chosen specifically by title under this voluntary agreement, must be shown free of any commercial interruption. This process may break down however in light of a recent case involving the film "Serafino," which an appeals court ruled could not be broadcast on Italian television with commercial interruptions because the interruptions violated the director's moral rights ıder Art. 6bis of Berne.[22]

In the United States, this approach might generate guidelines that limit panning and scanning and/or time compression or offer alternatives to panning and scanning, such as letterboxing. [23] The guidelines would come from the industry. They would not be government imposed.

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[22] Daily Variety, October 18, 1989, page 1, column 3.

[23] Letterboxing is a process which preserves the entire wide-screen film image in the conversion for viewing on a television screen, but reduces its size to keep the heighth-width ratio and overall composition of all of the film shots intact. This results in blank spaces at the top and bottom of the television screen.

The Office concluded also that if additional rights are granted by legislation, they should not only be granted to directors and screenplay writers, but also to the authors of preexisting works used in motion pictures, on or after the effective date of any new legislation. Preexisting works include musical compositions, short stories, and novels used in the creation of motion pictures. These authors should have the same rights as the creative authors of the films themselves.

Finally, we strongly urged that all creative participants in a motion picture: cinematographers, art directors, editors, and perhaps actors and actresses should be granted moral rights, and not just the principal director and principal screenplay writers as the directors wish. Producers that contribute to the creative process of the film should also have these rights, whether independently, or as part of the copyright ownership of the film. [24]

C. "Asphalt Jungle" Case.

In the first litigation of the colorization issue, a French court has recently refused relief to the heirs of John Huston for the colorization of The Asphalt Jungle.[25] On two earlier occasions, in summary (restraining order) proceedings held by the Tribunal de Grande Instance, affirmed by the Court of Appeals of Paris 14th Section, and on the merits in the Tribunal de Grande Instance, the court had enjoined the colorized version of Asphalt

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24 See, e.g. Article 93, Copyright Law of the Federal Republic of Germany.

25 Decision of July 6, 1989, Court of Appeal of Paris, 4th Chamber, section B.

Jungle from being broadcast by Le Cinq (Channel Five) on French television.[26]

In the defendant's view, the original work (the black and white film) was left intact -- it was not modified itself; color was merely added to create a new version (the computer-colorized work). The ruling of the lower court in favor of Huston's heirs was reversed on appeal, apparently on the primary ground that Huston does not have the status of an author of Asphalt Jungle under United States law since Huston was an employee and the work was made for hire. The court applied U.S. law because the parties to the contract for the creation of the film were American and the film was an American production.

This recent decision may not be the end of the road for the "Asphalt Jungle" case. The heirs, joined perhaps by authors' organizations, may appeal to a higher court.

III. DIGITAL SAMPLING

In holding today's hearing on moral rights, the Subcommittee is continuing to implement Senator DeConcini's promise to review moral rights issues in a comprehensive manner. In keeping with that intention to explore fully moral rights in the performing arts, I turn now to an entirely new technology, known as digital sound sampling, that Congress may wish to consider in a moral rights context. A digital "sample" is something of a

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26 Article 14 of France's copyright law gives directors of a motion picture the status of author (or co-author). Under French law, the author must be a natural person. The concept of corporate bodies as authors does not exist there.

misnomer, since sampling collects sound information at a rate of 44,100 times per second. A standard length 2 minute, twenty second song generates more than 6 million digital samples, resulting in a clone of the characteristics of that sound source. [27] As easily as playing a piano, it is possible to sample various sources -- performances of Miles Davis, Elvis Presley, John Coltrane, Jascha Heifetz, Paul McCartney, and Marilyn Horne-- and to assemble their contributions into a grand new composition they never performed. [28]

Because a performer's voice or unique instrumental style is the embodiment of that performer's personality, moral rights may be particularly relevant to digital sound sampling. [29] Already a controversy has erupted over a sampling of unique drum sounds. A conga drummer complained that a well-known keyboardist incorporated his sound sample in his "Miami

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27 Seligman, "Saved! Classic Rock Tracts Kept Forever Young on C.D.," 482 Rolling Stone 81, 82-83.

28 Pareles, "Digital Technology Changing Music: Who's The Owner Of A Tune 'Cloned' From A Single Note?" The New York Times, October 16, 1986, C23.

29 The issue of imitation of sounds has occurred in cases involving more traditional means, such as one singer mimicking another. See Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988). In this case, the court observed:

> A voice is more distinctive and more personal than [other] accouterments protected in [another case]. A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested.

But for different results, see Davis v. Trans World Airlines, 297 F.Supp. 1145 (C.D.Cal. 1969), and Nancy Sinatra v. Goodyear Tire and Rubber Co., 435 F.2d 711 (9th Cir. 1970), cert. denied, 402 U.S. 906.

Vice" theme music. The instrumentalist claimed he was entitled to compensation for that use. Because the union contract did not address sampling, he was neither paid for the session nor did he receive residuals.

The economic rights currently embodied in the Copyright Act may be insufficient to reach these types of unauthorized uses, since while copyright in sound recordings gives the copyright owner the right to control the creation of substantially similar derivative works, digital sampling allows the peculiar characteristics of someone's sound to be manipulated from only a few notes. By electronic means, these few notes may be transformed into an entire orchestral sound. Thus, using traditional copyright infringement principles, a one or two note sample may not be judged a substantial taking sufficient to constitute copyright infringement.

The livelihood of its members is of obvious concern to the musician's union. At stake may be a single recording, or in the case of television theme music, residual fees. In an era of declining use of live music, sampling does not represent a form of flattery to many musicians; instead it represents lost income from a shrinking market. One exception would be if the musician whose work was sampled received credit, the effect may be increased popularity, leading to future employment possibilities. Musicians can make their own judgment about this. I speculate that most musicians would prefer cash in hand rather than the hope of cash in the future, and, unless actionable, there is nothing to prohibit yet another person from copying the sample rather than hiring the musician.

Moral rights protection would give musicians the opportunity to

protect both the integrity of their works and future employment possibilities.

The Recording Industry Association of America (RIAA), consistent with Congress' decision with respect to the compatibility of United States moral rights with the Berne Convention, maintains that existing law suffices to protect the legitimate interests of performers and producers. Moreover, the RIAA argues that, to the extent the sound recording source of a digital sample is identifiable, the use of that sample should be considered substantially similar, and therefore a copyright infringement.

Like those of motion picture actors and actresses, the contributions of musicians to sound recordings are typically "works-made-for-hire." Thus the musicians are neither authors nor owners of the sound recording embodying their contributions. Unlike actors and actresses, musicians are considered as authors and initial owners of copyright, if the contribution is not a work made for hire. But to the extent they are employees, they have no standing to sue for copyright infringement when a substantial taking of their performance occurs. Moreover, since under the union contract only certain musicians receive credit when their performance is embodied in a recording, currently performers do not even have assured rights of attribution.

The Copyright Office has not studied technological alteration of sound recordings as extensively as it has studied alteration of motion pictures. Therefore, we do not make specific recommendations for or against moral rights for sound recording performers and record producers. We simply observe that it may be appropriate to consider the potentially far-reaching

effects of the use of digital sampling, a technology which is not limited to sounds: visual images contained in photographs and motion pictures may also be sampled. Sampling is becoming commonplace in the world of photography but has not been used, to my knowledge in the motion picture field for other than experimental purposes. For instance, technology is being developed to permit the "cloning" of human beings by computer as credibly as sounds are digitally sampled. Congress may also want to consider whether these technologies should be encompassed within moral rights legislation.

Of course, the other side of the coin invites scrutiny as well. Suppose an aging tenor could use digital sampling to allow his voice to do things it cannot do naturally -- reach those high notes or low notes that normally exceed his range. Or to allow him to substitute his voice for others on an existing opera recording. He could leave his fans and posterity a recording of every opera ever written. The possibilities raise a host of fascinating issues.

IV. LEGISLATIVE ISSUES IN GENERAL

Let me invite your attention to some of the issues raised by moral rights legislation in general. If Congress decides to enact additional moral rights legislation, I suggest you consider the following points.

1. Subject matter. The first issue is: what kinds of works will be accorded moral rights protection -- all copyrightable subject matter, or specified categories?

2. Beneficiaries. Second, who are the beneficiaries of these additional rights? Who is the author of a particular work? Should

employer-authors of works-made-for-hire be given moral rights? Should works-made-for-hire be excluded from additional moral rights protection? Whether a multi-collaborative work is made for hire or not, how many of the collaborators or contributors should be given additional moral rights?

The field of potential authors for collaborative works, such as motion pictures, is especially broad, with many contributors. The studio producer, (who is usually the copyright owner) or an independent producer with some creative control, the director, screenwriter, cinematographer, composer, art director, set directors, choreographer, editor, animators, and actors and actresses (especially in works that are "star vehicles") all participate in the creative process that makes a motion picture. One approach would be a statutory presumption that named individuals are authors (and thus moral rights holders), if they can prove they made a creative contribution to the work. The rights of authors of preexisting works used in motion pictures should also be taken into account. The fundamental questions of authorship may require industry-by-industry provisions because authorship and practices differ in the book publishing, theater, music publishing, motion picture, and sound recording industries.

3. Nature of the rights granted. Should the same rights of attribution and integrity be extended to all moral rights beneficiaries? Some would argue that since a right of attribution for all creative contributors would be relatively easy to administer, we should give every possible contributor the right to have their names added to, or removed from, the work. Proprietors, however, would probably not agree with the ease of administration argument.

Enforcement of the right of integrity is clearly more difficult (though not impossible). The right of integrity, as defined in Article 6bis of the Berne Convention states:

> [T]he author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Commentators have pointed out an unresolved ambiguity of purpose in the moral right of integrity: Is it to protect the personal interest of the author or to preserve the work the artist has created in (nearly) its original form?

The two objectives are not inconsistent, of course, but they can lead to differing statutory formulations of the integrity right, particularly in respect to whether prejudice to honor or reputation is a necessary element of any violation of the integrity right. Must one establish "prejudice" to the honor or reputation of the author as a necessary element of proof of any or all moral rights violations, or are there some per se violations of moral rights in cases of mutilation and distortion?

International practice seems to vary -- with a range of provisions running from those that prohibit any act in relation to a work that would have the effect of prejudicing its creator's honor or reputation, to those that prohibit mutilation or distortion of a work without any reference to honor or reputation.

4. Standards of proof. If the integrity right is based on damage to the author's honor or reputation, what are the standards of proof to establish such an injury? Although the practices vary from country to

country, it is typical to look at whether a particular use or modification would or could harm the professional reputation of an artist (using expert testimony).

In the United Kingdom and Canada, for instance, proof of injury to honor or reputation as a moral rights violation may be made in much the same fashion as certain coexisting torts sounding in defamation, particularly libel of goods or services and professional libel. It is not apparently necessary to establish that the artist/plaintiff has a preexisting high standing in the opinion of the critical artistic community. A mutilation or distortion of a work of an unknown artist may be defamatory in regard to the artistic reputation the creator might reasonably have been expected to enjoy had his or her work not been tortiously altered.

5. Exemptions or limitations. What exemptions or limitations should be attached to the additional moral rights? Should they be subject to a fair use limitation? Also, some uses, such as good faith restorations of works of art or architecture, or the removal of works incorporated in buildings would require exemptions.

Should certain rights, for example, of visual artists be limited to works of "recognized stature?" Should a visual artist's right apply only to works that have been publicly displayed with the authority of the author? Should the vesting of rights apply only to published works? For example, in the motion picture industry, should the additional moral rights be limited to post-production (or post-theatrical release) alterations only?[30]

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30 No one, not even the motion picture directors, suggests that adoption of new moral rights should provide directors with final cut authority (for the first theatrical release).

6. Alienability and waivability. Should the new moral rights be transferrable? Should they be waivable? Many countries allow the post-mortem transfer of moral rights by operation of law or by testamentary disposition. Statutory provisions declaring moral rights to be perpetual, inalienable, and imprescriptible originated in France and are found in many other national laws.

The waiver of moral rights, however, is a different matter. Most countries (expressly by statute or by decisional law) appear to allow waiver of the moral rights either generally or in respect of only certain works and/or uses. Exceptions to alienability and waivability exist with respect to collaborative works and collective works. Rights of integrity are limited in respect of cinematographic adaptations of works and appear to be more narrowly construed in the case of derivative works. Waivers compatible with such limitations may be enforced. The new United Kingdom moral rights law is an example of this approach.

7. Preemption of state laws. Any changes in federal law enacting new and additional moral rights should consider partial preemption of state laws. Such preemption must be compatible with our adherence to the Berne Convention.

8. Retroactivity. Congress should seek the advice of constitutional scholars before determining the effective date of any new moral rights--specifically to determine to which works the rights attach. As I have already indicated, serious attention must be paid to the Fifth Amendment rights of copyright owners who own works and have invested money in the

preservation of the original works, or in the creation of derivative (altered) works.

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In conclusion, the much talked about balance between protecting the rights of creative artists, copyright owners, and users must encourage the creation and dissemination of as many works as possible. I will be happy to answer any questions, now or later for the record, and to respond to any requests for technical assistance that the Subcommittee may have.

FOLLOWUP QUESTIONS ON MORAL RIGHTS
IN THE PERFORMING ARTS

QUESTIONS FROM SENATOR DECONCINI:

1. DID THE COPYRIGHT OFFICE, IN DOING ITS 1989 FILM INDUSTRY STUDY, ATTEMPT TO INVESTIGATE AT ALL THE ECONOMIC CONSEQUENCES OF THE ENACTMENT OF ADDITIONAL MORAL RIGHTS TO ARTISTS IN THE FILM INDUSTRY? PLEASE ELABORATE ON YOUR ANSWER FROM THE HEARING.

ANSWER:

In general, the motion picture producers have stated that moral rights would have negative economic consequences. For example, Roger Mayer, for Turner Entertainment, stated his belief, admittedly without proof, that the global dominance of United States motion pictures is due in no small measure to the fact that copyright owners can distribute their films without the limits on market exploitation that the European film industry experiences. Directors maintained that their efforts toward federal statutory moral rights are not at all about money. To prove their assertion, the Directors Guild of America advocated legislation that would award damages of $1.00 for infringement of moral rights, in keeping with the general view that moral rights, by their very nature are noneconomic, and stand in stark relief to the economic rights granted in the current

copyright law. Moreover, directors have repeatedly asserted the position that in view of the large sums spent on motion picture production, and the possibility of exploiting secondary market sources (which bring larger profits than does the theatrical market), all motion picture contributors -- whether it be for additional royalties or for enhanced name recognition -- have an interest in facilitating the exploitation of secondary markets.

2. IF WE WERE TO FOLLOW YOUR RECOMMENDATIONS OF ACCORDING ADDITIONAL MORAL RIGHTS TO ALL CREATIVE ARTISTS, WOULDN'T WE BE RUNNING THE RISK OF CREATING A SITUATION IN WHICH MOST MOVIES COULD NOT BE SHOWN ON COMMERCIALLY BROADCAST TELEVISION? THE RECENT DECISION IN ROME THAT THE MOVIE "SERAFINA" COULD NOT BE BROADCAST ON BROADCAST TELEVISION WITH COMMERCIAL INTERRUPTIONS WOULD SEEM TO INDICATE THAT NO MOVIES ON FREE TELEVISION COULD BE THE RESULT UNLESS, AS YOU INDICATED AT THE HEARING, A LEGISLATIVE EXCEPTION COULD BE CARVED OUT. PLEASE DISCUSS HOW THIS MIGHT BE ACCOMPLISHED.

ANSWER:

The answer would depend on what form federal statutory moral rights took in the United States. In Europe, the Court of Appeals result in Italy is balanced by the appellate result in France in the Asphalt Jungle case. The French court ruled that the colorized version could be shown on French TV because of the studio's identity as employer-author, which undermined any moral rights claim on behalf of the screenwriter or director. Since Houston was an employee, it was understood that he would not enjoy moral rights in the United States. The French court in effect applied United States law. According to Congress' conclusion that the

Berne Convention in the United States is not self-executing, neither one of those decisions has any necessary bearing on United States law.

Legislation could be drafted that specifically excepts normal commercial interruption from any moral rights protection, as is excluded in the National Film Preservation Act's definition of "material alteration." Section 11 excludes "practices such as the insertion of commercials and public service announcements for television broadcast."

3. HAVE YOU GIVEN ANY THOUGHT TO THE PRACTICAL CONSEQUENCES OF YOUR RECOMMENDATION THAT ALL CREATIVE ARTISTS IN THE FILM INDUSTRY BE ACCORDED ADDITIONAL MORAL RIGHTS? WOULDN'T SUCH AN ENACTMENT BE A SUBSTANTIAL OBSTACLE TO THE USE OF ANY POST-THEATRICAL RELEASE OUTLETS SUCH AS NETWORK TELEVISION, CABLE, VIDEOS AND THE LIKE?

ANSWER:

Not necessarily. First, presumably any new moral rights law would be prospective. Also moral rights could be made waivable. The parties would then have the opportunity to decide on credits and the limits of material alteration before the film is released. Finally, the relief granted for material alteration might be limited to requiring labeling upon exhibition, to reflect any artist's disapproval of post-theatrical technological alteration of a motion picture in which he or she participated, as will be done for the films which will be placed on the National Film Registry over the next three years.

4. I APPRECIATE YOUR COMMENTS ON MORAL RIGHTS IN OTHER PERFORMING ARTS, PARTICULARLY YOUR COMMENTS ON DIGITAL SAMPLING OF MUSIC. IN YOUR DISCUSSION, YOU SEEM TO FAVOR A MORAL RIGHTS SOLUTION TO THE PROBLEM. WHY COULDN'T A REMEDY BE ACCOMPLISHED BY AN EXPANSION OF THE DEFINITION OF INFRINGEMENT? I UNDERSTAND THAT MOST MUSIC IS PRODUCED THROUGH WORK-FOR-HIRE CONTRACTS, BUT WOULDN'T THE COPYRIGHT HOLDER ALSO OBJECT TO THE SAMPLING USE OF THE MUSIC? AND IF THEY DIDN'T, COULDN'T WORK-FOR-HIRE AGREEMENTS BE WRITTEN SO THAT THE MUSIC COPYRIGHT OWNER WAS CONTRACTUALLY OBLIGATED TO AVAIL ITSELF OF ANY INFRINGEMENT REMEDY AT THE REQUEST OR DEMAND OF THE ARTIST?

ANSWER:

Infringement remedies go to the copyright owner, whose interests could be different, for example, from the artist whose performance is sampled. Although their interests are often the same, a copyright owner/record producer may wish to further exploit whatever market can be developed from its stock (especially where the artist is no longer under contract to that production company), against the artist's wishes. Moreover, a digital sample may be recorded live and may be too short to constitute a sufficient quantum of copyrightable material until the sample is expanded into a complete work. In that case, only the compiler may have a protectible work of authorship.

5. SEVERAL OF OUR WITNESSES TODAY HAVE POINTED OUT IN THEIR WRITTEN TESTIMONY THAT THE OVERALL PURPOSE OF AMERICAN COPYRIGHT LAW IS TO ENCOURAGE CREATION OF ARTISTIC WORKS BY THE INCENTIVE OF A LIMITED MONOPOLY

ON USE OF THE WORK. OUR INQUIRY TODAY THEN SHOULD BE TO DETERMINE WHETHER THE CHANGE ADVOCATED BY THE ARTISTIC COMMUNITY WILL FURTHER THE OBJECTIVE ON THE PURPOSE OF COPYRIGHT AND ULTIMATELY BENEFIT THE PUBLIC. OUR WITNESSES FROM THE PRODUCERS' SIDE OF THIS DEBATE HAVE TESTIFIED THAT THEIR ABILITY TO FINANCE NEW WORKS WOULD BE SEVERELY HAMPERED BY MORAL RIGHTS LEGISLATION. IS THIS THEN A QUESTION OF QUANTITY VERSUS QUALITY OF PUBLICLY AVAILABLE PERFORMING ARTS WORKS? ARE YOU AWARE OF ANY PUBLIC POLICY THAT INDICATES THE PUBLIC INTEREST WOULD BE BETTER SERVED BY ENSURING THAT THE PUBLIC HAS ACCESS TO A LIMITED NUMBER OF UNALTERED WORKS, AS OPPOSED TO A LARGE NUMBER OF ALTERED, TIME COMPRESSED, INTERRUPTED, AND/OR COLORIZED WORKS?

ANSWER:

Directors would argue that the public is best served when it can view the works as the author intended them. One could also argue that the restriction of derivative works stimulates the production of original works. As members of the Berne Union, the United States accepted the existence of moral rights. Theoretically then, if motion pictures are materially altered to injure the honor or reputation of creative participants, there is a beneficial public purpose in preventing such injury within the constitutional framework.

6. WITH REFERENCE TO THE DIGITAL SAMPLING TECHNOLOGY YOU DISCUSS IN YOUR WRITTEN TESTIMONY, YOU INDICATE THAT A NEW WORK MAY BE GENERATED FROM ONLY A FEW NOTES OR IMAGES. YOUR WRITTEN TESTIMONY INDICATES THAT SUCH A TAKING MIGHT BE CONSIDERED DE MINIMIS UNDER THE PRESENT COPYRIGHT LAWS. YET, IN DETERMINING WHETHER THE TAKING OF MATERIAL FROM A COPYRIGHTED WORK

IS FAIR USE, COURTS MUST WEIGH A NUMBER OF FACTORS, INCLUDING THE EFFECT OF THE TAKING ON THE MARKET. IF TAKING A NEW NOTES AND DIGITALLY MANIPULATING THEM IS SUFFICIENT TO DENY AN ARTIST THE INCENTIVE TO CREATE THAT THE COPYRIGHT SYSTEM IS SUPPOSED TO OFFER, ISN'T IT UNLIKELY THAT A COURT WOULD FIND SUCH A TAKING TO BE FAIR USE? WOULD THE ARTIST BE PROTECTED BY DOCTRINES CONCERNING DERIVATIVE WORKS?

ANSWER:

Images present less of a problem than sounds, since a single photograph is copyrightable. As for "sound bite" samples, a court might not reach the question of fair use, since that question only arises when a copyrightable work is at issue. The artist is, in most cases, not a copyright owner, so ordinarily the artist would have no right to prevent the creation of derivative works. The statutory rights devolve on the copyright owner, who would be in the position of deciding whether to sue for infringement when only a small amount has been taken. A court might find that such amount was de minimis. If so, the question of fair use, an affirmative defense, may not be reached if the court rules that plaintiff did not make out a prima facie infringement case.

7. IN A HEARING CHAIRED BY MY COLLEAGUE SENATOR LEAHY ON MAY 12, 1987, MR. ELLIOT SILVERSTEIN OF THE DIRECTORS GUILD TOLD THE SENATE SUBCOMMITTEE ON TECHNOLOGY AND THE LAW THAT DIGITAL VIDEO SAMPLING TECHNOLOGY HAS REACHED THE POINT WHERE WE MAY SOON BE ABLE TO GENERATE NEW FILMS STARRING FAMOUS DECEASED ACTORS SUCH AS JOHN WAYNE, CLARK GABLE, OR RITA HAYWORTH. YOU

MENTIONED THIS POSSIBILITY IN YOUR WRITTEN STATEMENT. EVEN IF SUCH A DIGITALLY GENERATED WORK ISN'T COVERED BY CURRENT COPYRIGHT LAW, WOULDN'T IT BE PROHIBITED BY COMMON LAW OR STATE DOCTRINES, SUCH AS THE RIGHT OF PUBLICITY RECOGNIZED BY MANY STATES.

ANSWER:

Yes, protection might be available under state law, but such protection is uncertain. Also, the state laws are far from uniform. Lack of uniformity may well be the primary reason to enact federal statutory moral rights. National legislation is needed because it is inefficient to have individual state laws where the works are distributed interstate and internationally. Problems concerning preemption, conflict of laws, and the cost of multiple litigations alone might dissuade many from pursuing their rights. (See Baltimore Orioles, Inc. v. Major League Players Association, 805 F.2d 669 (7th Cir. 1986), cert. denied, 107 S.Ct. 1593 (1987). Nationals of Berne states are likely to find protection against sampling in the United States even more daunting. With digital audio sampling, legal options have at least been pondered by legal commentators, the trade press, unions, and attorneys on both sides of the controversy. A higher degree of uncertainty surrounds artists' protection against digital video sampling, as it is the newer technology of the two.

QUESTION FROM SENATOR GRASSLEY:

IN YOUR TESTIMONY ON PAGE 13, YOU STATE THAT IF CONGRESS CHOOSES TO GRANT A HIGHER LEVEL OF MORAL RIGHTS THAN NOW EXISTS IN THE MOTION PICTURE INDUSTRY, THE COPYRIGHT OFFICE COULD SUPPORT IT IN PRINCIPLE.

HOWEVER, YOU ADD THAT ANY PROTECTIONS HAVE TO BE "APPLIED WITH EQUAL FORCE TO ALL THOSE WHO CONTRIBUTE EXPRESSION TO THE MOTION PICTURE."

WHAT DO YOU MEAN BY "CONTRIBUTE EXPRESSION?" HOW DO YOU DEFINE EXPRESSION?

ANSWER:

I made the statement alluded to in Senator Grasseley's question in the context of the proposal of directors to create new federal moral rights legislation establishing the rights of directors and principal screen writers to prohibit "material alteration" of theatrical motion pictures. Other contributors to the creative process underlying the motion picture would have no voice under this proposal." The Copyright Office prefers an even-handed approach to moral rights legislation. One group of creators should not be given the exclusive rights to authorize alterations while similar rights are denied to other creators.

One major problem in dealing with moral rights in motion pictures is that motion pictures are a collaborative effort which produces a single, unitary work. It is not possible to compartmentalize the expression into individual units. As to who contributes expression in a motion picture, clearly the director and principal screen writer are significant contributors. There are, however, many others. In many cases, a motion picture is based on a preexisting work, such as a novel or play. In such cases, the author of the preexisting work is clearly a contributor of expression. In all cases, cinematographers, art directors, editors and

actors contribute substantial expression underlying every motion picture. If moral rights are to be accorded special recognition with regard to motion pictures, it is only fair to incorporate all significant contributors within the scope of the new rights.

QUESTION FROM SENATOR LEAHY:

DURING THE COURSE OF YOUR EXTENSIVE STUDY OF "TECHNOLOGICAL ALTERATIONS TO MOTION PICTURES," DID YOU ENCOUNTER ANY EVIDENCE THAT THE AVERAGE CONSUMER IS DISSATISFIED WITH THE WAY FILMS ARE SHOWN ON VIDEOCASSETTE AND CABLE OR BROADCAST TELEVISION? ARE AMERICA'S CONSUMERS PLEASED WITH THE WAY FILMS ARE SHOWN ON VIDEOCASSETTE AND CABLE OR BROADCAST TELEVISION?

ANSWER:

The debate over colorization has unquestionably stirred public passions. Many "consumers" don't like colorized films for aesthetic reasons, and freely express this opinion. Others appear to prefer the colorized versions to the black and white versions. In the Copyright Office's recent rulemaking proceeding regarding registration of colorized motion pictures, the Copyright Office received 46 comments, which is a high number for proceedings on copyright issues. While the Office attempted to discourage arguments regarding aesthetic considerations, many of the comments filed related simply to the question of whether or not the commentator found the colorized motion picture aesthetically pleasing. Most who took the time to file comments were critical of colorized films.

As to the debate over aesthetics, most producers would simply demur. For those who prefer to watch black and white, they could either watch the black and white original, or they could turn the color off on their television. If the market place is going to be the final determinant, it is clear that the consumer has a wide range of choices. Never before in the history of the motion picture industry have so many works been so readily available and in so many formats. It is true that the marketplace is not perfect and that some of these formats may represent alterations of the original work that some decry. However, there is no evidence suggesting that copyright owners are withholding or intend to withhold the original forms of these works from the marketplace for aesthetic reasons, or because they supposedly want to "push" the colorized version of the work.

QUESTION FROM SENATOR SIMPSON:

IN TESTIMONY BEFORE THE SENATE SUBCOMMITTEE ON PATENTS, COPYRIGHTS, AND TRADEMARKS ON OCTOBER 24, 1989, GEORGE STEVENS, JR., NOTED THAT THE DIFFERING POINTS OF VIEW ON MORAL RIGHTS WERE BEST EXPLAINED BY A STATEMENT OF JIMMY STEWART, "IT IS WRONG TO BUTCH THESE FINE FILMS THAT WERE MADE WITH SUCH CARE. JUST PLAIN WRONG." AND BY A STATEMENT OF TED TURNER, "THE LAST TIME I LOOKED, I OWNED THOSE FILMS AND I CAN DO WHATEVER I WANT WITH THEM."

BASED ON YOUR KNOWLEDGE OF CURRENT COPYRIGHT LAW, WHICH STATEMENT WOULD MORE ACCURATELY REFLECT THE LEGAL POSITION OF: (1) THE ORIGINAL CREATOR OF A WORK OF ART, AND (2) THE CURRENT HOLDER OF A COPYRIGHT COVERING THAT WORK.

ANSWER:

Clearly the original creator of a work of art would feel like Jimmy Stewart that it is fundamentally wrong to materially alter a work of art. Ironically, the copyright owner of many works of art continues to be the original artist. This is due to the copyright principle embodied in 17 U.S.C. §202 that transfer of the material object does not transfer the copyright. In order to transfer the copyright, a second conveyance is necessary. In many sales of works of art, the material object is transferred without the copyright. In this regard, many collectors of works of art are distinguishable from Ted Turner in that they do not own the copyrights underlying their collections, while Ted Turner does own the underlying copyrights comprising his company's motion picture library.

Under the case law which has arisen, the owner of a work of art is usually accorded a right to destroy the work of art, even though he may not be the copyright owner of the work. These cases have galvanized the artistic community into seeking recognition of moral rights in works of art under the federal copyright statute.

Senator DECONCINI. Mr. Oman, thank you. I do thank you and your legal counsel and others in your organization for a really thorough presentation in your statement and your report. I appreciate the time your office puts into this. I think you are not given enough credit for all the work you do, not only for this subcommittee, but in the process of operating as the Register. I thank you very much.

I do have a couple of questions. I am going to submit a lot of them because of time this morning.

Did the Copyright Office, in doing the 1989 film industry study, attempt to investigate at all the economic consequences of the enactment of additional moral rights to artists in the film industry?

Mr. OMAN. That was one of the issues that we did get into in some detail. We had two members of the team visit industry headquarters in Hollywood and they talked to many of the experts. Maybe it would be best for me to call on one or two of them to give a brief response.

Senator DECONCINI. Please, if they could give us a brief summary.

Mr. OMAN. Mr. Schwartz?

Mr. SCHWARTZ. We have competing versions of what the effect would be. The motion picture companies, the corporations that were doing the colorization and other alterations, said that it would have a devastating effect on their ability to market their works in subsidiary markets. The point has been repeatedly made that very few films are profitable from theatrical runs, and that the only way for them to recoup their expenses is in ancillary markets. In those ancillary markets you have to make certain alterations to those films, many of which are the subject of the hearing today.

For the other side, the directors and other creative artists say that they are not opposed to all alterations but only certain ones, and that if they exercised their rights in an unreasonable fashion, they wouldn't be employed in the future, so there was some sort of self-correcting mechanism there.

Really, though, there isn't any empirical evidence, since we don't presently have the rights that the directors seek. So while we heard the arguments on both sides, the sort of evidence that you might weigh in the absence of any empirical data is generally impossible to make an informed judgment on.

Senator DECONCINI. Do you have anything else to add?

Mr. SCHWARTZ. No, Mr. Chairman.

Senator DECONCINI. Thank you.

Let me turn to another subject. If we were to follow your recommendations of according additional moral rights, Mr. Oman, to all creative artists, wouldn't we be running the risk of creating a situation in which most movies could not be shown on commercial broadcast television?

Mr. OMAN. That's one of the questions that should be resolved. But my personal recommendation, Mr. Chairman, would be that if you do decide to enact a higher level of moral rights than currently exists, that you be fairly explicit in establishing the standards that would be applied by the courts.

Senator DECONCINI. In other words, you would carve out an exception stating specifically that the moral rights granted would not prohibit commercial interruption. For example, in the recent decision in Rome that the movie "Serafino" could not be broadcast on broadcast television with commercial interruption—in the legislation you would specifically state otherwise? Is that what you are suggesting?

Mr. OMAN. That is essentially the point. It could be handled by a series of limitations, or it could be handled by a set of explicit guidelines. We would have to establish standards of proof that might be required to establish an injury. Would hurt feelings qualify? Would loss of future job opportunities qualify? It has to rise to the level of doing injury to the honor and reputation of the artist. That's a fairly high standard, and I think you should be explicit in laying it out.

Senator DECONCINI. Would you suggest Congress set the standard in the legislation, or would you give it to somebody else to do for us?

Mr. OMAN. Well, I think it would be most useful to the courts if it were actually incorporated in the legislation. Otherwise, we could wind up with injunctions being issued for all sorts of frivolous reasons, and it could have very adverse effects on the economic health of the industry, particularly the motion picture industry.

When I was a student in Paris in 1960 I walked down the Champs-Élysées and of the 12 major motion picture houses on the Champs-Élysées, there were 11 French movies and 1 American movie. Last month when I walked down the Champs Élysées, there were 11 American movies and 1 French movie. I think that's a lesson that shouldn't be lost in terms of the potential damage that can be done to an industry by having too high a level of moral rights, and preventing aftermarket exploitation of the work which in many ways is the only way——

Senator DECONCINI. Your example given in France, the conclusion is that their standards are too high and that has actually damaged their film capabilities. Is that what you're saying?

Mr. OMAN. That may be an oversimplification of my observation, which is obviously anecdotal, but I think that the limitations that are placed on the marketing of works— for instance, in Italy now, this lower court decision preventing the insertion of commercials in a motion picture makes it a less attractive investment. And without the investment, you're not going to have as many movies made.

Senator DECONCINI. Sure. Thank you, Mr. Oman.

I will submit the balance of my questions. If you would respond to them, I would appreciate it.

Senator DECONCINI. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

On page 10 of the executive summary of your March 1989 report on "Technological Alterations to Motion Pictures," you state that you "analyze the esthetic effects that technologies have on theatrical motion pictures."

Do we risk opening ourselves up to the same kind of bait that we just recently got through on the National Endowment for the Arts debate concerning the Government's role in making esthetic judgments? Or do you mean something different?

Mr. OMAN. Let me call on Mr. Patry to answer that question. He drafted that particular provision of the report.

Mr. PATRY. The use of the word "aesthetic"——

Senator LEAHY. We had so much fun with that last debate on the floor of the Senate that we found it was a lot easier to spend days and days talking about a $40,000 NEA grant than about the fact that our schools have slipped behind Europe and Japan, and the fact that we now have the biggest balance-of-payments deficit ever, or a huge deficit, or the fact that the United States has become sort of a "second world" power instead of a "first world" power in the area of technology. We didn't have time to debate that or the drug question, health care, housing, or anything else, but by gosh, we sure debated the heck out of that $40,000 NEA grant, showing the world what is important to this country. I was just wondering if this is doing the same thing.

Mr. PATRY. I would hope not. If it is possible to think of the term "aesthetic" in objective terms, that's really what we were dealing with. When the original applications came into the Copyright Office for colorized versions of black and white motion pictures, what we had to decide was whether or not there was sufficient extra authorship in the colorizing process to warrant a new copyright. One of the factors we looked at is whether the overall effect, the overall look-and-feel or "aesthetic" of it was in fact new.

That's really how we're using "aesthetic" here. Our conclusion, of course, was that yes, there was sufficient overall authorship there to warrant a new copyright. Had we not come to that conclusion, we would have rejected them.

We are using "aesthetic" in that technical sense. Is what's being done something which changes the way in which you appreciate the motion picture? It's not "aesthetic good or bad" or "publicly valuable" or "publicly invaluable." It's really a technical, legal consideration of the term.

Senator LEAHY. I see.

Mr. Oman, in your study did you find out how the average person reacts to the way films are shown on television or video cassettes? Does anybody object to the fact when a film is shown on television that whole chunks of it get chopped out, it may get squeezed up, ads are thrown in, it's impossible to follow the continuity, it's a little screen, the sound is bad—in fact, the screens are almost as small as those at the "Cinema 25's" that we go to?

I don't want to suggest any bias in that question. [Laughter.]

Mr. OMAN. There was a series of complaints along those lines. People who are very serious about film generally prefer to watch the work as it was intended to be shown, in a theater without any interruptions, without any reediting, without any lexiconing, panning and scanning, or any of the other alterations that occur from time to time when a work is shown on television.

But that judgment really didn't enter into the conclusions of our study in any material way. I think everyone recognizes that the showing of a work on television is inferior to the showing of a work in the theater, and it does not generally raise the issues of moral rights in a direct way. It does, of course, raise the issues indirectly in that it could—in some circumstances, if the editing were so severe—injure the honor or reputation of the author.

Let me ask—

Senator LEAHY. "Panning and scanning"—that did show up as one of the areas of concern?

Mr. OMAN. It was an area of concern. Of course, only someone with a practiced eye can recognize the effects of panning and scanning, and someone has to be familiar with the original version to recognize the effects of panning and scanning. We may have some examples of that today; I see some monitors set up in the hall. I'm not sure they will be giving examples of it, but panning and scanning was one of the technologies that people did complain about rather strongly.

Senator LEAHY. Mr. Schwartz?

Mr. SCHWARTZ. I was just going to say that for panning and scanning, the practice has existed since 1961. We have found that the overwhelming complaints were for older pictures, earlier in the practice.

One of the areas we did look at in the esthetics, in the creation of motion pictures, was the way in which pictures are now filmed in expectation that they will be broadcast on television. So you find that although some of the problems of panning and scanning have been lessened, you have changes in the way motion pictures are made in that they are made for a smaller television screen, knowing they will be broadcast on video cassette eventually.

Those were the areas we looked at. We did hear from public witnesses and we did hear complaints about panning and scanning and other practices as well.

Senator LEAHY. Even some who complain the most about artistic rights are willing to sell movies to networks or airlines who chop them up. Someday the movie industry itself may ask how much artists really care about the final product. The other night I took two of my children to watch a movie in a movie theater because we figured that for $20 we could see it on a screen twice the size of our television screen. Halfway through, when the film finally was in focus, and it got into a very quiet part, we found ourselves listening to a gun battle in a movie two theaters over. Prices go up, but with a few exceptions I don't find that the industry itself—and this is not aimed at any of you witnesses—but at some of the others in the room—makes any effort, really, after putting together a tremendous movie—where directors and producers, writers, actors, everyone else, have just done everything possible to make it good with fantastic cinematography—to be sure that the movie gets distributed and gets shown in a way that all that work does not get lost and diminished. It's interesting.

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator Leahy.

Thank you, Mr. Oman, and thank you for having your experts here to respond to some of our questions.

Our next witnesses will be in a panel: Mr. Peter Nolan, vice-president and general counsel, Walt Disney Co., representing the Motion Picture Association of America; and Mr. J. Nicholas Counter III, president, Alliance of Motion Picture and Television Producers.

Gentlemen, if you would proceed by summarizing your statements, your full statements will appear in the record.

We will start with you, Mr. Nolan. Welcome.

STATEMENT OF PETER NOLAN, VICE PRESIDENT AND COUNSEL, THE WALT DISNEY CO., REPRESENTING THE MOTION PICTURE ASSOCIATION OF AMERICA

Mr. NOLAN. Thank you, Mr. Chairman. It is always a pleasure to come before your committee. I am here today representing not only my own company, the Walt Disney Co., but also the Motion Picture Association of America, of which Disney is a member.

Mr. Chairman, wherever we go in virtually all nations of the world, American motion pictures are being played, being rented, being sold. The global market for our motion pictures is exploding, and the proliferation of video technology has a lot to do with that.

I have just returned from a business trip to Europe. On my flight to London I was treated to a movie on the airline, Universal's K-9. That was a foreign carrier. On my flight to Paris I saw another motion picture by an American company. In Paris they were promoting "Crocodile Dundee II" on the Champs-Élysées as well as 11 other motion pictures, as Mr. Oman pointed out. In Frankfurt I walked down the street and passed a video store that was promoting Walt Disney's "Bambi," and on my flight back—this was on an American carrier—was Universal's "Field of Dreams."

The success of the American motion picture is good for industry. In fact, it is good for our Nation's balance of trade. Our films bring home a surplus every year, year after year, of $2.5 billion annually, the second largest surplus of any U.S. industry.

Domestically and around the world, a critical component of the future of the motion picture is video, however. Video markets are essential to us. Video gives consumers selection, convenience, and low-cost access to our motion pictures. More and more consumers want their movies on video. Our goal is to keep them satisfied.

Adapting a motion picture to video is not simple, however. What many people don't know is that we must make skillful use of new technology to give the video viewer the same enjoyment that the person has who is watching a motion picture in a theater.

Today we may hear numerous references to some mysterious sounding processes, such as panning and scanning, time compression, and time expansion. In the mouths of certain advocates these words drip with emotion, but in truth they are simply a few of the technologies we have customarily used over many years when adapting motion pictures to the video medium.

I hope we can now put aside this emotion and focus on what the average American perceives as panning and scanning and time compression, which is to say they don't perceive them at all, and that's the way it should be.

Mr. Chairman, in our industry we believe it is always best to let our pictures do the talking. Therefore, with your indulgence, I would like to present a short video presentation that will introduce the committee to—and hopefully demystify—the important business of adapting our motion pictures to video.

Senator LEAHY. Mr. Nolan, before you start that, could I just ask one question? Did you watch the movie, either on the way over or on the way back?

Mr. NOLAN. Yes, I did, in both instances. I had not seen them in the theater. [Laughter.]

Mr. NOLAN. Excuse me. I did not watch all the movies. I did not watch a British motion picture.

[Video presentation made:]

VIDEO NARRATOR. Americans love movies. They go to movie theaters more than a billion times every year, and when they can't get to their local cinema, they relax in their own living rooms and watch the latest from Hollywood or their favorites from the past.

Over 90 million American households have television sets. A recent USA Today poll showed that 69 percent of Americans prefer to watch their favorite films at home rather than in theaters. According to the video rental industry experts, an average family rents 90 to 100 movies per year. Cable services that specialize in movies have more than 43 million subscribers.

FEMALE INTERVIEWEE. Everybody loves to watch movies. We watch probably three or four times a week.

MALE INTERVIEWEE. Once in a while I will rent a movie and bring it home on Saturday night and watch it. If the kids are home and it's something they like, we will all watch it together. Other times we watch cable, and the kids are constantly running movies and watching cable and HBO and Showtime, every chance that we have.

Mr. NOLAN. It is hard to believe that the video industry is only 9 years old. It has essentially grown from a handful of VCR's among a few people, to today, where over 64 percent of American households have a VCR and use a VCR. At the same time, the number of stores renting movies has grown dramatically from a few back in the early 1980's to over 25,000.

VIDEO NARRATOR. Movies are made for the big screen, then they must be adapted for television and the video marketplace. Transferring a movie from film to video presents a challenge. First of all, the TV screen you are watching right now is much, much smaller than a movie theater screen. TV's have always had a different shape; it is more square, while the movie screen is more rectangular. And while the picture you see in the movie theater is a single, solid image, the picture on your TV screen is made up of hundreds of horizontal lines, all pushed together. As a result, the resolution—or picture detail—on your TV screen is not nearly so sharp as on a movie screen.

Video presents other constraints, too. TV broadcasters, may need a film to be shortened or lengthened to meet fixed time periods.

MALE INTERVIEWEE. When we air a feature movie, we have to make sure that it ends promptly at 11 o'clock so that our news can start on time; that every hour we can get our station breaks in that are mandated by the FCC; and that we have commercial content in it.

VIDEO NARRATOR. Technology helps broadcasters who may need to edit a film to meet FCC standards, or to ensure that the material they broadcast is suitable for a family audience.

MALE INTERVIEWEE. Well, for instance, Westinghouse owns five television stations in five very different markets, from San Francisco to Baltimore to Boston. The standards in these communities, what they will accept and what they won't accept, are different. We are licensed in the city of Baltimore, and we are very sensitive to what people here will accept and won't accept.

VIDEO NARRATOR. Adapting film to video and meeting predetermined time periods: Two puzzling problems for the businesses that bring big screen movies into America's living rooms, two puzzling problems that are addressed through state-of-the-art technology. Let's take a look at two examples of how these technologies permit us to convert from the silver screen to the TV screen, while preserving your enjoyment of the original film.

Here is a clip from the Paramount Pictures release, "The Untouchables." You will see the same clip in two versions. In the first version, the image has been "letter boxed." It is an attempt to transfer the entire rectangular image that you see in the theater to the more square video screen. In letter boxing, it is necessary to put large black bands above and below the image. That means fewer lines of picture information are conveyed to your eyes. This poses a problem. The letter box picture is not as sharp as the original film, and the audience's concentration on the story line is distracted by the annoying black bands.

The average viewer who purchases a 15- to 19-inch television set is going to be disappointed when the black bands overwhelm the picture. You will see what we mean.

In this clip, set in Elliot Ness' home, focus on such details as the design of the wallpaper and the edge of a kitchen knife—they look rather fuzzy.

Most important, focus on the newspaper that Ness is reading. The headline is an important part of the film's story line, but as you can see, the headline is very difficult to read.

FEMALE INTERVIEWEE. I felt totally frustrated. I could not watch a movie like that. I have a hard time watching a home movie. I just want to take the screen and stretch it.

MALE INTERVIEWEE. If those particular black bands are constant throughout a particular motion picture, I think you would have a lot of consumer complaints simply because they are used to watching television full screen.

VIDEO NARRATOR. Now, here's the same scene after it has been panned and scanned. Highly trained professionals have used state-of-the-art electronic and computer technology to carefully select portions of each frame of the film. In fact, you rarely see a movie at home that has not been panned and scanned. As a result, there is no need for distracting black lines to surround a picture.

Notice how the details that were fuzzy in the letter box version are now more clear and vivid. And look at how clear that newspaper headline now appears.

FEMALE INTERVIEWEE. I definitely like the wide screen better. You can see everything clearer. The TV screen is small enough, and then they put the black lines there and you can hardly see anything.

VIDEO NARRATOR. Now, let's look at a scene from the Touchstone motion picture release, "Tough Guys." It combines panning and scanning with time compression. Time compression permits us to reduce the length of a movie for use on television or airlines. An alternative technique, time expansion, lengthens the movie cycle. By use of these techniques you don't have to take original footage out. What is most remarkable about these techniques is that there is no noticeable change in the way the characters move or in the way they sound. Special technologies let us speed it up or slow it down, yet make it look and sound completely natural. That's why you have never noticed time compression in all the years you have watched movies on TV.

Here's a short example of what we mean by time compression, two different versions of the same scene from "Tough Guys," one of which is an original version, and the other speeded up slightly. Let's see if we can tell the difference without looking at your watch.

[Two extracts from "Tough Guys" shown.]

VIDEO NARRATOR. The original was version No. 2. Rest assured, you are not the only one who couldn't detect any difference in the movement of the characters or the accompanying sound.

You have now seen for yourself how some of the technologies used in transferring movies to video are used. Technology is getting better and better; the adaptations are virtually unnoticeable. That's because quality and customer satisfaction are our top priorities. Most important, technology permits us to make films available to more people through free over-the-air TV, cable TV, airlines, and VCR's. That way, consumers have convenient access to as many films as they want.

[End of video presentation.]

Senator DECONCINI. Thank you, Mr. Nolan. I am going to ask that the balance of your statement be submitted so that we can hear from Mr. Counter.

[The prepared statement of Mr. Nolan follows:]

Testimony of Peter Nolan
Vice President - Counsel, The Walt Disney Company
Before the Subcommittee on Patents, Copyrights and Trademarks
Senate Judiciary Committee
October 24, 1989

Mr. Chairman, my name is Peter Nolan, and I am vice president - counsel of The Walt Disney Company.

It is a pleasure to appear before this committee representing my company and the Motion Picture Association of America, of which Disney is a member. The members of MPAA are the leading producers and distributors of motion pictures and television programs in the nation and the world.

I welcome the opportunity to explain to this committee how the so-called "moral rights" debate affects the American motion picture industry and the consumers who want our products. I hope that by better acquainting this committee with our business, we can more clearly make our point: that moral rights legislation would be unnecessary, unjustified, and an unwarranted encumbrance on our ability to broadly distribute our copyrighted works.

The consequences of legislating moral rights would be wholly inconsistent with the public interest goals of the copyright clause of the Constitution and the Copyright Act. In our nation, the purpose of copyright is to benefit the public through encouraging the wide dissemination of creative works. That purpose would be contravened by granting personal benefits to non-copyright holders

which could have the effect of keeping creative works out of the public's hands.

American Movies: A Global Success Story

Mr. Chairman, thanks to the quality of our product, the ingenuity of our marketing, and our ability to adapt films to video using state-of-the-art technology, the American motion picture is a global phenomenon. In almost every corner of the globe, at any given moment, American movies are on display.

I just spent two weeks in Europe, where public demand for American film entertainment is as great as ever.

On my flight to London, the airline treated us to a major motion picture on its video screens, Universal's "K-9."

From my hotel in Paris, I noticed a big promotion for the video release of Paramount's "Crocodile Dundee II."

As I walked down a street in Frankfurt, I passed a store promoting Walt Disney's "Bambi," which had recently been released in Germany on videocassette.

On the flight back from Paris to Washington, I was offered yet another major motion picture.

That I would encounter American movies at every turn should come as no surprise. American companies make the most popular, the most desirable film entertainment in the world. We have also invested substantial sums in pioneering more new ways to make our films available to consumers when and where they want them.

Choice, convenience, low cost, high-quality entertainment -- that's what we offer consumers, in America and all over the world.

And increasingly, the way consumers want their movies is through "video," which basically includes every medium other than a traditional theatre screen: broadcast and cable television... satellite transmissions to the home... hotel and airline exhibition... the rental or purchase of videocassettes and laser discs... and many other video media yet to come.

You may have noted that in every instance where I mentioned seeing a motion picture in Europe, the movie was in one video format or another. Domestically and globally, video distribution of motion pictures today represents an essential part of our business.

Video is Essential to the Movie Business

Just how important is video to the motion picture industry? Consider these facts:

-- Last year, revenues from the sale of videocassettes to consumers and to rental stores exceeded the box office revenues for all motion pictures.

-- The average motion picture may be seen in theatres by two-and-a-half million Americans over the course of its initial release of 8-12 weeks. On broadcast television, the same motion picture may typically reach over 22 million Americans in a single evening.

-- In the not-too-distant past, when a motion picture had completed its initial theatrical run, consumers who missed the movie would be hard-pressed to find it again. Today, a consumer can readily choose from an extensive catalog of movie titles through local video stores, specialized cable TV channels and other sources.

-- With the privatization of broadcasting and cable television in foreign markets, we have new and exciting opportunities to expand our sales of American movies abroad... sales which currently

create a surplus of over $2.5 billion per year for the nation's balance of trade.

Moviemaking has always been, and remains, an extremely high-risk enterprise. Two-thirds of motion pictures released by MPAA member companies never recoup their costs. Access to the ancillary video market is vital to our industry. It helps us recoup the literally billions of dollars we invest every year in the production, distribution and promotion of our movies.

Therefore, to continue making the best-quality motion picture entertainment, we need the flexibility to take advantage of every available market. Anything that restricts our ability to use those market opportunities makes our risky business all the more so.

That is why we are particularly fearful about proposals to impose moral rights legislation on our industry. We believe such laws are wrong in principle, and would hamper our ability to adapt motion pictures for the numerous markets that are essential to their financial success. We also believe they would be unfair to consumers whose access to films on video may be limited by such laws.

The Technology of Preparing Movies for Video

What has given rise to calls for moral rights in this industry? They seem to be inspired largely by the techniques and processes we use in transferring motion pictures to tape for the many video markets I described earlier. Let me try to remove the cloud of emotion that looms over these issues, and describe factually just what is involved in the film-to-video transfer process.

The transfer of a motion picture to video is a challenge. The motion picture is originally produced for exhibition on the large theatre screen. Preparing it for exhibition on the video screen requires certain adaptations.

There are some fundamental differences between movies and video. The size and shape of the screens are different; movie screens tend to be larger and more rectangular in shape, while video screens tend to be much smaller and more square in shape.

The picture quality is also substantially different. The image on a movie screen is essentially a single, solid, richly-colored picture. The image on a video screen, by contrast, is made up of hundreds of horizontal lines all squeezed together. Even the best of commonly-available video technology does not yet approach the picture quality of the movie screen, but we do all we can to

deliver the best possible picture.

Video places certain other constraints on the motion picture producer. Some video formats require that motion pictures be tailored to fit requisite lengths. For instance, for scheduling reasons, broadcasters like to have motion pictures fit within certain standardized time periods: say 1 1/2 or 2 hours. Otherwise, their viewers would find it extremely inconvenient to tune into a movie at 8:00 p.m., followed by a situation comedy at 9:37, followed by another motion picture at 10:07, followed by their local news at 12:16. And the next night's schedule would be different, and equally erratic. Certain other video formats, such as laser disks (which have a limited running time), also impose constraints that must be addressed.

Some video outlets (e.g., broadcasters and airlines) and some countries require, as a matter of law or policy, that motion pictures be edited to meet standards and practices which prevail in the medium. If a motion picture cannot be tailored slightly to be appropriate to the intended audience, it may not be seen at all.

All in all, the marketplace imposes a great many demands upon the motion picture producer seeking to distribute his work. If these demands are not or cannot be met, essential marketing opportunities are lost. This means that consumers lose access to motion pictures they want to see. This means motion picture

producers lose audiences and revenues. Neither of these outcomes further the underlying purposes of the Copyright Act: to stimulate creativity and to promote public access to creative works.

To meet the demands of the marketplace, motion picture producers use various techniques and processes to adapt films to video. When doing so, our priority is to maintain the qualities that made the film attractive to viewers in the first place:.

"Panning and Scanning": Since the early 1960s, the industry has used the process of "panning and scanning" in preparing movies for video. Using computer technology, highly-trained professionals select portions of the original motion picture image which will fit into the video screen's different shape while still conveying the "feel" of the original. Panning and scanning permits us to fill the video screen with the image. If we did not "pan and scan" films, our only alternative would be to "letterbox" them. This would mean showing the film in its original "rectangular" aspect ratio, with broad black lines at the top and bottom of the video screen. As a result, there would be less picture information reaching the viewer. With the smaller video screen, picture resolution, sharpness and detail would be lost. Experience shows that the average consumer who purchases a 20-inch TV set wants to see the biggest picture possible, and does not want to have precious inches taken up with distracting black bands.

Time Compression and Expansion: For the past decade, the industry has used techniques which slightly increase or decrease the running time of a movie. So-called "time compression" and "time expansion" are accomplished through electronic means and are imperceptible to the viewer; video and audio are perfectly synchronized to look and sound entirely natural. Through these techniques, motion picture producers can reduce their need to edit materials out of films to shorten them, or to add materials back in to lengthen them.

Editing: As noted, the needs of various media do sometimes require the editing of motion pictures. Broadcasters are sensitive to parents' desires not to have certain scenes in motion pictures delivered into the family's living room. Airlines who carry passengers of all ages also want their motion pictures to be satisfactory for family viewing. When we edit films, we are always alert to preserve what made the movie appealing in the first place.

Color Correction: To ensure that colors are consistent throughout the video version of a motion picture, and to retain the fidelity of the original film image -- which can fade over time -- we apply a computerized process called "color correction,",where, using computers, we go through the film frame-by-frame. Animators like Disney go to great lengths to ensure the vitality and trueness of our colors.

Foreign Markets: To prepare our motion pictures for foreign markets, we must frequently dub in new soundtracks or add subtitles. We also need to comply with widely varying foreign censorship laws if our movies are to be exhibited at all in certain markets.

Of course, under our collective bargaining and other contractual agreements, we undertake these film-to-video transfer techniques and processes in consultation with certain of the original creative contributors. Nick Counter of AMPTP will tell you more about this in his testimony. But I would like to take a moment to respond to the suggestion that these "consultations" are not meaningful. In fact, the working relationship among directors, producers and video transfer technicians is cordial and constructive, as you would expect them to be. After all, if a motion picture producer is going to put tens of millions of dollars at stake on a project, the producer must have a strong working relationship with the director, and will certainly not wish to put that relationship in jeopardy by ignoring the wishes of the director during the film-to-video transfer.

Are Criticisms of These Technologies Valid?

When we apply these and other technologies to the process of transferring films to video, we do so for one reason only: to give

consumers what they want.

Consumers want to see our films. They want the best possible picture and sound. They want full-screen video... they tell us that watching "letterboxed" movies is like peering at the picture through Venetian blinds. They want the convenience of watching movies on TV or cable, and the luxury of choosing from among thousands of titles at their video store.

Consumers have not resisted or rejected our use of the various technologies I have described. They have embraced them. They rent motion picture videocassettes by the millions. They clamor for more movies on broadcast and cable TV. Voting with their dollars, they have endorsed our efforts to keep them entertained.

The public interest -- as measured by what the public is interested in -- is clearly served by our industry's common-sense application of these various technologies and processes in the film-to-video transfer process.

If consumers rejected these practices, we would, too. That goes without saying. We are not in the business of chasing away business. But the marketplace is the best forum for resolving the issue of whether these technologies do or do not serve the public interest. The evidence is overwhelming that they do.

Technology is the Friend of the Motion Picture

To those who suggest that video technologies are the enemy of the motion picture, I suggest they look again.

But for the growth and expansion of video technologies, much of our nation's cinematic heritage would lie mouldering in dark vaults. Instead, Americans can readily view movies of every age and category. As film critic Vincent Canby recently observed, video increases consumer access to existing films and helps fuel increased production of new films:

> The development of the videocassette recorder has been the greatest boon to theatrical films since the refinement of sound -- I now find it difficult to imagine ordinary life without it. The videocassette has reclaimed audiences that had stopped going to movie theaters. It creates additional revenues that, in turn, insure further production.
>
> There once was a time when movies, having been seen in a theater, could be stored only as memories, often distorted ones... [Today] the videocassette... provides... virtually instant access to the entire heritage of movies... Today almost anybody anywhere can have a mini-festival devoted to the work of Greta Garbo, Abbott and Costello, Fritz Lang, John Hughes, Ingmar Bergman or Billy Wilder. ["Classics Thrive on Screen Test," New York Times, Sept. 10, 1989, at H-19.]

Indeed, video technology has often provided the commercial incentive for restoration of motion pictures.

Moreover, video technology is constantly and rapidly improving. Our companies apply state-of-the-art techiques to our

28-054 - 90 - 34

video transfers, giving consumers the best possible picture and sound. Every time there is a new advance, we rush to incorporate it... 8 millimeter video, Super-VHS, surround-sound, and next, perhaps, high-definition television (HDTV). With each technological improvement, consumers become even more eager to see and enjoy American movies.

Remember, too, that regardless of the processes involved in transferring a film to video, the original motion picture print or negative is in no way affected. In every instance, the original version of the motion picture is preserved. Because video distribution of movies creates new revenue opportunities, that means copyright owners have new incentives to preserve, restore and market motion pictures which might otherwise not be seen, or only be seen infrequently.

Therefore, I must ask: is the public benefitted or harmed by the technologies and processes used in bringing movies to video? Is the public interest better served by promoting consumer access to copyrighted motion pictures, or by keeping these movies stored away safe, secure, "pure" and unseen?

Why The Concept of "Moral Rights" Is Inappropriate to Our Business

Beyond the adverse consequences that moral rights may hold for the availability of motion pictures in video, I believe it is

imperative to note that attempting to confer moral rights on particular contributors to a motion picture is simply inappropriate.

The creation of a motion picture is a highly collaborative effort, perhaps uniquely so among creative enterprises. The concept for a motion picture may originate with a producer, a director, an actor, a writer, or any of a number of other participants in the creative process. Any of these players may act as a magnet for other talent to become involved. The producer may act as matchmaker, casting and script consultant, and visionary for the project; the producer also is responsible for the financing without which there is no picture.

An extraordinary number of creative contributions from a diverse range of players -- most certainly including the producer -- are subsumed into the final work, with virtually all such contributions credited in accordance with collective bargaining agreements and industry practice.

It is simply wrong to suggest that only the director, or only the screenwriter, or only the two in combination, or any other single creative contributor or combination of contributors should be deemed the "author" or "authors" of a motion picture for purposes of establishing rights of "paternity" and "integrity." This is particularly true since, in our industry as elsewhere,

success has many fathers, but failure is an orphan. In fact, in the case of a motion picture, the responsibility -- at least the financial responsibility -- for failure is firmly affixed on the producer.

While the other creative contributors are guaranteed their wage for their work on a failed film, none of these contributors must participate in the losses.

In summary, it would simply be incorrect to decree, as a matter of law, that any particular contributor or contributors to the making of a film are especially entitled to hold "moral rights" in the film. Under our current copyright law, authorship and all the rights associated therewith properly reside with the copyright owner -- generally the producer of the film -- without whose participation there would be no film.

It would be a terrible contortion to try to impose moral rights principles on filmmaking. And it would also be a waste of time and effort, particularly when established mechanisms for sorting out such rights are available to all creative contributors: the collective bargaining and contractual processes.

The Copyright Office Report

The nightmarish complexities of the moral rights debate are nowhere better demonstrated than in the efforts of the Copyright Office to come to grips with them.

At the request of the chairman and ranking member of the House Subcommittee on Courts, Intellectual Property and the Administration of Justice, the Copyright Office took a broad look at moral rights in the motion picture context, and reached some perplexing and not altogether consistent conclusions.

First, the report suggested that the Congress "seriously consider a unified federal system of moral rights." It is not clear why the Copyright Office decided to make this gigantic leap which was well beyond the scope of the inquiry put to them by the House subcommitee leaders. Suffice it to say we strongly disagree with this conclusion. We believe Congress chose the prudent course in voting to bring the U.S. into the Berne Copyright Convention when it found that the totality of U.S. law -- federal, state statutory, and common law -- provided protections sufficient to satisfy Berne, and determined that moral rights should not be expressly incorporated in our federal copyright law.

Second, the report suggests that any legislative effort focussing on moral rights in the motion picture industry should begin with careful consideration of "whether the existing web of collective and individual bargaining is adequate to protect directors' legitimate interests." Two points:

-- one, the report singles out one creative contributor -- the director -- to the production of a motion picture as holding "moral rights" of particular value. In so collaborative a business as movie production, this assumption is highly questionable, as the Copyright Office seems later to concede.

-- two, the test posed by the Copyright Office aptly recognizes that collective and individual bargaining are highly sophisticated in our industry. Motion picture production is characterized by a remarkably high degree of collective bargaining. This suggests not only that any legitimate moral rights of contributors are today adequately protected; it also indicates that the forum and the opportunity for raising other legitimate concerns are readily available to interested parties.

Finally, the report suggests the Copyright Office could "support... in principle" legislation to "grant a higher level of moral rights in the motion picture industry than now exists," and outlines the parameters which the Office believes would be appropriate. Here is a perfect example of the incredible hornet's

nest raised by efforts to legislate in this complex arena. The Copyright Office would extend moral rights only to "works created on or after the effective date of the legislation." This addresses the retroactivity issue... or does it? If advocates of moral rights are legitimately concerned about pre-existing motion pictures, how would such legislation affect those movies? If they are not concerned about pre-existing motion pictures, on what basis do they claim special treatment for future motion pictures?

Another concern: the "takings clause" of the U.S. Constitution prevents the government from taking away property without just compensation. Would retroactive legislation take away a copyright owner's rights in his movie? If Congress were to pass a moral rights law preventing certain adaptations, will the government compensate the copyright owner who has already distributed copies of his movie and made contracts for it to be shown on cable and broadcast television?

The Copyright Office further suggests that such rights should be "granted to authors of pre-existing works and to other creative participants in the motion picture (e.g., cinematographers, art directors, editors, and perhaps, actors and actresses)."

What is the rationale for stopping there? Doesn't a composer of a motion picture soundtrack make an important creative contribution to the final work? (After all, what's the first thing

you think of when I say "Chariots of Fire" -- isn't it the distinctive theme song?) Isn't the contribution of a choreographer central to the success or failure of a musical or dance film such as "Fame" or "Flashdance"? And the animators of a cartoon -- mightn't they do as much as the director or editor or writer to give films their "character"?

Even if all these players were not accorded "moral rights," what would happen when the "moral rights" of one contributor collided with those of another? What if a director says "go ahead and edit that scene," but the screenwriter believes the scene should remain the way it is? Who is to sort out such claims? And what would the consequences be for the industry?

And what if there are multiple contributors to a work in various categories? Who decides who was the "principal director" or the "principal screenwriter" of a film? What happens if the "principal director" of a motion picture agrees with a film-to-video adaptation, but the "principal screenwriter" objects? If one screenwriter wrote 85 percent of the script, but the contribution of a second screenwriter -- who wrote only 15 percent -- is what really made the film "work"?

What would happen if a contributor got into a disagreement with the copyright owner over a matter totally unrelated to the film itself? He might object to any adaptation whatsoever. Would

it be fair for one contributor to hold the interests of other contributors -- not to mention the consumer -- hostage by exercising his "venal veto"?

In short, Mr. Chairman, even the best efforts of the Copyright Office indicate that legislation in this area would be a morass. Better to focus on how the collective bargaining process -- the best, established forum for legitimate artistic complaints -- can resolve these disputes.

The Copyright Office did reach one conclusion with which I wholeheartedly agree: "[T]he proponents of change in the existing law should bear the burden of showing that a 'meritorious public purpose is served by the proposed Congressional action.'" That should be a sine qua non of Congressional deliberations on these issues.

The Foreign Experience with Moral Rights

Mr. Chairman, when I talk about the incredible complications that moral rights would create for the American motion picture industry, I am not talking about mere hypothetical situations. Actual experience with moral rights in foreign countries demonstrates just how devastating these concepts could be if imported into American law:

** Just last week, an Italian court ruled that placing even one commercial break in the television broadcast of a motion picture violates the "integrity" of the work and, thus, the "moral rights" of the film's director.

If that happened here, there is no question that "free TV' would abandon motion pictures. That would represent a tremendous loss to the nation's viewers.

I should point out that the situation in Italy before this latest ruling was no better. Italian courts used to consider these issues on a film-by-film basis, somehow balancing the so-called "quality" of the film against the number of commercial breaks inserted. Can you imagine thrusting American courts into such a role? And can you contemplate what the consequences would be for American broadcasters?

** A famed Russian composer [Dmitri Shostakovich] brought suit in both France and the United States to enjoin the use of one of his compositions -- which had lapsed into the public domain -- in a motion picture which he believed portrayed the Soviet Union in an uncomplimentary light. The American court rejected the claim, but the French court upheld it.

Again, imagine the producer of a film trying to determine how an author of a work -- particularly a public domain work (for "moral rights" in some countries also attach to such works) -- feels (or, if deceased, might have felt) about the otherwise authorized use of his work in a motion picture. And imagine if

this were extended to the other elements incorporated in a film. This would impose intolerable creative restrictions on film producers... and on directors, too.

** While the next two examples do not directly involve motion pictures, the principles at stake are equally of concern.

-- A German operatic stage director sued when the conductor ordered changes in certain of his stage directions for a production of Wagner. The German court found that the conductor's changes offended the integrity of the stage director's work, and enjoined the production.

-- A French artist who painted the stage sets to be used in an opera sued when the producer decided, for artistic reasons, to delete a scene from a performance. The French court ruled that the artist's moral rights had been violated, and ordered that the public be given notice that the scenery in question was not being shown due to the fact that the scene in which it was to appear had been excised.

It is mind-boggling to contemplate what putting these principles into American law could mean for motion picture production. In order to edit a single scene in a motion picture, it could be necessary to obtain the approvals of the director, the

screenwriter, the set designer, the stage manager, the choreographer, the cinematographer, and who knows how many other contributors... none of whom bore the financial risk of producing or marketing the film, and all of whom may claim "moral rights" which may well conflict with one another.

** In Brazil, the law requires that any person who uses an intellectual work created by another author, composer, lyricist or performer must identify these people in any broadcast of a film incorporating the work... no matter how insignificant the work may be to the film in which it is incorporated. Imagine the effect this could have on broadcast of films on U.S. television, particularly pre-existing films where it may be extremely difficult to identify the original contributors.

I believe these real-life examples -- which are representative, not anomalous, cases -- show the mischief that legislated moral rights can and would create.

The Practical Dilemma of Moral Rights

In the end, the extension of moral rights by statute to specific creative contributors in so highly collaborative a process as motion picture production is simply not justified in principle.

But let me put the issue in more practical terms: what might the extension of statutory moral rights mean in a day-to-day context for the motion picture industry?

-- It might mean that we will be unable to make as many motion pictures available to consumers in all the formats and through all the media that they enjoy today. Consumers who simply do not want to watch "letterboxed" films may have no choice if a creative contributor to a film can insist on it. Consumers who prefer to watch their movies on broadcast TV may simply get fewer movies if creative contributors can object to the way the films are edited or adapted for video.

-- It might mean that the release of motion pictures in video formats will be delayed or denied due to squabbles between competing "moral rights" claimants. If various moral rights claimants assert their potentially conflicting and mutually-exclusive rights, certain motion pictures may spend more time on screens in courthouses than on screens in consumers' homes. And delay can sap the commercial life from a "hot" film.

-- It might mean that the massive financial risks we take in making a motion picture will grow even riskier. In addition to contending with the vicissitudes of the marketplace, we will also have to deal with continuing, disruptive objections to our video transfer efforts. That will tend to keep motion pictures out of

video markets and out of the hands of consumers who want to see them.

-- It might mean that the exhibitors or distributors of motion pictures in video formats -- broadcasters, cable programmers, video store operators, airlines and hotels -- will eschew the risk of violating some unanticipated "moral right" claim by a creative contributor by simply not carrying as many motion pictures, or by carrying only those motion pictures where moral rights concerns are not present.

Moral rights will not mean anything except inconvenience and lost consumer access to movies. Where is the public interest in that?

Does it truly behoove the Congress to wander into the creative process in ways where it is arbitrating between creative contributors? Would the creation of statutory moral rights in the motion picture context contribute in any meaningful way to the availability of motion pictures to the American public? Can Congress ever hope to draw clear and enforceable lines to indicate who has "moral rights" and what those rights are and where one contributor's rights end and another's begin? And having done so, would the Congress have made any meaningful contribution to the creative process?

Let me ask a more fundamental, political question: who is genuinely concerned about this issue? The gripings of a handful of creative contributors to motion pictures and a few film critics do not constitute the vox populi. Indeed, the vast and silent majority of Americans would prefer simply to go on enjoying their movies on video, and don't give two cents for all the whoop and holler raised by a very few in the name of "moral rights."

Indeed, if the general public were to understand some of the implications of the proposals put forward by moral rights proponents -- how putting such rights in copyright law could hamstring the release of movies on video or make various video outlets more reluctant to carry movies -- I predict that they would say to you, "Leave well enough alone."

Recommended "Criteria" for Analyzing These Issues

Mr. Chairman, I believe your counterpart in the House subcommittee with jurisdiction over these issues aptly stated the "criteria" that should be applied in assessing whether moral rights legislation pertaining to motion pictures should be pursued.

"First, we must ask the proponents of change to bear the burden of proving that a change is necessary, fair and practical," Chairman Kastenmeier said.

"Second, we must always recognize, and balance, the rights of creators, producers or copyright holders, and the public interest.

"Third, a private solution negotiated by interested parties is always preferable to congressional intervention."

That is a very fair and eminently sensible series of criteria. I hope this Committee will also adopt them.

Conclusion

Mr. Chairman, as your committee takes a broad look at so-called "moral rights" issues in a variety of contexts during this Congress, I am sure you will find these concepts to be vexatiously vague and complicated. That is particularly true, I submit, in the context of motion pictures.

But getting beyond the academics' contemplation of great legal principles and bringing the issue down to basics, the idea of legislating moral rights for motion pictures is simply counterproductive. For the reasons outlined above, ladening moviemakers with moral rights obligations can only serve to confuse the industry and ultimately to reduce the diversity and variety of motion pictures reaching consumers.

This is bad for our business. This is bad for our nation's balance of trade. This is bad for the public. On the whole, that makes the pursuit of moral rights for motion pictures simply a bad idea. We hope you will so conclude.

STATEMENT OF J. NICHOLAS COUNTER III, PRESIDENT, ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS

Mr. COUNTER. Mr. Chairman, members of the committee, thank you for the opportunity to be here today.

The Alliance of Motion Picture and Television Producers is the trade association which bargains with all of the unions and guilds representing the various employees who contribute to the making of a motion picture. I think the fact that a motion picture is a collaborative art form is underscored by the fact that we negotiate in excess of 70 industrywide labor contracts with these unions and guilds, representing employees from actors and actresses to writers, directors, technicians, camera operators, cinema photographers, sound technicians, and the like.

I think it is important to remember that fact when you consider this whole subject matter as to who can claim or might claim moral rights when you consider such legislation.

The two principal moral rights referred to in the Berne Convention have long been the subject of collective bargaining in our industry, and that is really the focus of my testimony this morning.

The first is the right of attribution, or paternity. In our business it is called "credits." I must tell you that literally hundreds of thousands of hours have been spent at the bargaining table with the various guilds and unions on that subject, the result of which you will see in your daily lives. You have seen them in the form of credits on the screen, either at the beginning or at the end of a movie. I would urge you some time to take the time to sit through all the credits that run at the end of a movie. It will give you some idea of the number of people who participate in the making of a motion picture. Almost all of those people, about 90 percent of them, are unionized and represented by very strong unions, with whom we bargain.

Another example of how credits are translated from the collective-bargaining process to real life situations is shown by this poster which I have with me today, and which we will leave with you. You will find these in movie houses; you will find them on billboards, particularly in California along Sunset Boulevard. And the placement and the size and shape of those credits are precisely and very closely negotiated with each of the guilds. Of course, we have the problem of balancing the interests between the various contributors to the making of a motion picture as to how their credits are shown on the screen, as well as in advertising.

In fact, if you look at your Washington Post weekend supplement each Sunday, you will find advertisements of our movies in various forms. The way the credits are laid out in that advertising is, again, the subject of very intense negotiations. I have an example here which not only has credits but also quotes from various critics, which our marketing people feel is very important in the marketing of a motion picture. These credit rules in these collective bargaining agreements also deal with the subject of how many words you can use in critics' quotes, and they go into great detail in terms of the placement of those credits.

The same thing is true with respect to video cassettes, on the cover of video cassettes. Those rules, again, are spelled out in the collective bargaining agreement.

The other important area, this panning and scanning that you have just seen an example of, the time compression issues, these, too, have been the subjects of collective bargaining with the guilds and the industry. The Directors' Guild is one example. In the 1987 negotiations we agreed to a provision which requires the producer to consult with the director with respect to things like panning and scanning and time compression and expansion. In fact, it is my understanding that this goes on today; when our companies give notice when this process is to take place, the director is then given an opportunity to participate in the process of panning and scanning. Subject to their availability, it is my understanding that this process has been working and working to the satisfaction of all parties.

I would also emphasize that intertwined with these so-called moral rights are very substantial economic rights. Not only do the producers of motion pictures rely on the aftermarkets, the video adaptations of theatrical motion pictures, in these various markets, but so do the various guilds and union members who receive residual payments under our collective-bargaining agreements as a result of these exhibitions. In fact, hundreds of millions of dollars have been paid to actors, writers, and directors as a result of these exhibitions. In fact, the below-line employees, the behind-the-scenes people represented by the IATSC—their medical plans today are dependent upon the revenues derived from those payments as a result of these exhibitions, to the tune of $60 million which will be paid this year into the medical plans to provide benefits for those employees.

So it's not just directors and producers, but there are a whole bunch of other people who are involved in this process and who rely upon this collective bargaining process for their rights and benefits.

Lastly, I would conclude by saying that the collective bargaining process has worked for over 40 years in our business. It is flexible. It can adapt itself to technological changes that occur rapidly in our business. Some would argue that moral rights are not a mandatory subject of bargaining, and that the producers cannot be forced to bargain about those subjects. The bottom line is, whether they are mandatory or permissive, we have negotiated on these subjects for over 40 years and there is no reason to suggest that we will not continue to do so.

Thank you.

[The prepared statement of Mr. Counter follows:]

Testimony of J. Nicholas Counter, III
President, Alliance of Motion Picture and Television Producers
"Moral Rights" and Collective Bargaining
Senate Judiciary Committee
Patents, Copyrights and Trademarks
October 24, 1989

Mr. Chairman, Members of the Committee, my name is J. Nicholas Counter III. I am the President of the Alliance of Motion Picture and Television Producers -- known as the AMPTP.

The AMPTP represents the companies that produce movies and television shows.[1/]

Our job is to negotiate and administer collective bargaining agreements with the guilds and unions which represent those employed to help make movies. We negotiate with the directors, writers, screen actors, musicians, art directors, cinematographers, editors, costume designers, make-up artists, sound engineers and set designers. The list goes on -- I've highlighted a few just to reflect the great variety of professionals who collaborate to make a motion picture.

I have been asked to testify today about the extent to which so-called "moral rights" are ensured through collective bargaining. The question of "moral rights" and collective bargaining was discussed in the last Congress during the debate

on the Berne Copyright Convention. After an exhaustive study, this Committee found that U.S. law, taken as a whole, provides American creators the equivalent of "moral rights" required by Article 6bis of Berne -- the rights of paternity and integrity. The Committee's Report states that those rights emanate from the Lanham Act, various state statutes, as well as common law principles such as libel, defamation, misrepresentation and unfair competition.

We agree with the Committee. The existing laws work together with America's flexible, open marketplace to ensure that the rights of artists, copyright owners, and other creators are adequately protected.

Collective Bargaining and Creative Rights

Many copyright experts recognize the collective bargaining process as a particularly effective means of addressing and resolving concerns about creative rights. The movie industry is the preeminent example of employees and employers actively negotiating to establish creative rights. And the contract between the Directors Guild and the producers that is negotiated by AMPTP provides a good example of how the process works.

Every three years, the directors and producers revisit their collective bargaining agreement. The parties last met for a

formal negotiation in 1987 and will sit down again in just a few months for the 1990 round. Note that the parties meet during the term of the agreement to discuss creative rights issues of mutual concern. The 250-page employment contract presents a comprehensive set of rights that a producer must provide a director, and covers everything from health and pension issues to "moral rights."

The Register of Copyrights observed in his March 1989 report on Technological Alterations to Motion Pictures that, "[L]abor relations in the motion picture industry have a long history and do not present a situation where the economic leverage of the employers dwarfs that of the employees." (p. 68) As the person who sits across the table from the DGA's negotiators, I can tell you that the Register couldn't be more correct.

I can also state with confidence that artists' rights can be best fashioned, shaped and given substance if they are the product of informed discussion between those who best know our highly specialized business. Indeed, 40 years of free market negotiations have made America's film industry one of our nation's strongest.

The Committee should note that once the DGA and the AMPTP reach agreement, the results are far-reaching and widespread. Our agreement is frequently adopted by production companies not affiliated with the AMPTP. In fact, the vast majority of

America's motion picture production companies -- and directors -- rely on the standard DGA contract.

Credit Where Credit is Due

The collective bargaining agreement (the "Agreement") guarantees that every director gets credit for his or her work. Those credits you see at the beginning and end of a film, and on all the newspaper ads and billboards, are assured as a result of extensive negotiation. The Agreement requires the director's name to be prominently displayed:

-- on the screen when a film is shown theatrically, on TV, or on videocassettes;

-- in advertising or publicity on most billboards, posters, newspapers and other media;

-- on the record jacket when a soundtrack from the film is released;

-- on the cover of a book identified with the film.

These rights are specified in great detail. The Agreement even prescribes:

-- the size of the type that must be used to spell out the director's name

-- that the credit read, "Directed by . . . "

-- that the director's on-screen credit must appear by itself

and other conditions that ensure visibility and publicity.[2/] Each of these provisions is negotiated point-by-point, and each is valued by the director whose contribution is prominently noticed.

Producing, Editing and Releasing the Film

The Agreement goes well beyond the important issue of director credit and details the director's role in the production and release of a film. One of the chapters of the Agreement that sets forth a director's creative rights begins by noting that:

> The Director's professional function is unique, and requires his or her participation in all creative phases of the film-making process, including but not limited to all creative aspects of sound and picture.

> The Director's function is to contribute to all of the creative elements of a film and to participate in molding and integrating them into one cohesive dramatic and aesthetic whole.

The Agreement specifies the rights and responsibilities of the parties during the preparation of the film. For example,

> It guarantees the director's absolute right to make the "first cut" of the film without interference. Producers agree that directors have earned the right to present their employers with their vision of the work.
>
> It entitles the director to make recommendations to the producer for further changes to his cut of the film.
>
> It grants directors a reasonable opportunity to review and assess the version of the film that the producer intends to release in theatres.

The Agreement guarantees the director's right to consult with the employer throughout the entire post-production period.

And the Agreement extends to the post-release period, too:

-- The Agreement obligates the producer to endeavor to have a film broadcast without any edits. If changes must be

made to meet broadcast standards or a TV station's schedule, the director must be given the opportunity to make the initial effort at editing the film. The Agreement requires the producer -- in conjunction with the director -- to try to make the edits rather than allowing a broadcaster to do so.

The director's rights in the editing of a film for post-theatrical release extend to network television, domestic broadcast syndication, national pay television exhibition, and domestic home video.

If the producer needs to insert additional scenes into a film to ready the film for video release, the director has to be offered the chance to do the job.

When a film's producer hopes the Motion Picture Rating Board will give his film one rating -- say 'PG' -- and the Board gives it another -- say 'R' -- the director has the right to fully participate in the appeal proceedings and to make any changes necessary to achieve the desired rating.

Adapting Films from the "Big Screen" to the Video Screen

Videocassettes, broadcast TV, cable TV, satellite TV and the airlines' in-flight movies give millions of consumers the chance

to see movies they may have missed in the theatres. These video formats offer a convenient and inexpensive way to view a great variety of movies.

Motion picture producers -- who usually own the copyright in films -- have always had the flexibility to adapt films from the "big screen" to the video screen. In 1987, during the most recent round of negotiations between the directors and producers, the parties agreed that the director will be consulted before a movie is adapted to meet the requirements of TV viewing.

The right of consultation covers "panning and scanning," "time compression," "time expansion," "colorization," and "3-D conversion."

The "consultation" process works well. The directors, producers, and technicians approach the adaptations in a professional and constructive way. The producer notifies the director when a film he worked on is being adapted for video, and the director comes in and discusses the adaptation with the producer and technician. Sometimes the director chooses to sit with the technician in front of the video console that controls the film-to-video transfer. I understand that in most cases, the director decides to give the technician some basic parameters and reviews the video version only after the adaptations have been made. And in many cases, the director does not seek any further refinement to the technician's adaptation. Everyone involved in the process

is committed to maintaining the integrity of the film while preparing it for unrestrained video distribution.

Dispute Resolution

The Agreement sets up a workable and effective process for addressing grievances that arise from alleged violations of the Agreement itself, or individual employment contracts. Disputes are resolved swiftly and at little expense to the Directors so that the project can get back on schedule.

The Collective Bargaining Agreement is a Floor -- Not a Ceiling

It is essential to remember that the collective bargaining agreement sets the minimum level of protection afforded all DGA directors. Most directors negotiate individual contracts that go beyond the terms of the Agreement. For example, Woody Allen has stipulated in some of his contracts that he will not consent to the "panning and scanning" of his films, and that is, of course, honored. Warren Beatty insisted that Reds not be "time compressed." Many decades ago, Orson Welles crafted a contract that, in the view of the film's current copyright owner, would not permit the "colorization" of Citizen Kane.

Individual employment contracts may encompass such things as the choice of cast members, crew, and composer. In some cases, a

director negotiates for the right to make the "final cut" -- the version that is ultimately released to the public in theatres.

I'll agree that the more established a director, the greater the leverage he or she has to expand upon the rights in the Guild agreement. But I also think that this long -- and incomplete -- list of rights shows that the producers who risk tens of millions of dollars in creating and marketing a film are in no way minimizing the contributions of the less established directors.

Conclusion

Mr. Chairman, we submit that the current system effectively protects the creative rights of those who contribute to the making of a motion picture.

It is fair to both producers and directors, both of whom are fully capable of looking after their own interests in the negotiating process.

It works because it has proven flexible and responsive. Over the years, the Guild Agreements and individual employment contracts have been adapted to meet the new technologies that have continually transformed our industry. This happened when television revolutionized the way entertainment programs were delivered to the home. The recent Agreement to provide consultation when a film is colorized, time compressed, time

expanded or panned-and-scanned is proof of the flexibility of the process now in place.

Above all, it works because for more than forty years the producers have conducted their business and settled their differences with their employers without Congress jumping in and taking sides. My testimony focuses on the directors, but we have to balance the rights of many contributors. Our agreements have to extend rights and privileges to a variety of parties -- some of whom have competing interests -- while retaining the practical ability to make a movie. That's where these gray hairs come from.

We believe, however, if federal "moral rights" legislation were enacted, the federal government will be unnecessarily immersed in the marketplace and the established business relationships between directors and producers will be drastically altered, perhaps irrevocably.

Congress should let this marketplace mechanism continue to operate. It should let these issues continue to be resolved through negotiation, not legislation. It should not step in and declare a winner as to issues better left to the collective bargaining process. We recommend that Congress not upset the current system and refrain from enacting "moral rights" legislation.

FOOTNOTES

1/ The AMPTP represents a variety of producers of TV programs and motion pictures, such as: Aaron Spelling Productions; The Burbank Studios; Columbia Pictures Entertainment Inc.; Embassy Television, Inc.; Four Star International Inc.; Hanna-Barbera Productions; Lorimar-Telepictures; MGM/UA Communications Co.; MTM Enterprises; Orion Television, Inc.; Paramount Pictures Corp.; Ray Stark Productions; Stephen J. Cannell Productions; Sunrise Productions, Inc.; Twentieth Century Fox Film Corp.; Universal City Studios, Inc.; Viacom Productions, Inc.; Walt Disney Pictures Inc.; Warner Bros. Inc.; and Witt/Thomas/Harris Productions.

2/ Section 8-201 provides, in part, that the director of a theatrical motion picture "shall be accorded credit on all positive prints and all videodiscs/videocassettes of the film in size of type not less than 50% of the size in which the title of the motion picture is displayed or of the largest size in which credit is accorded to any other person, whichever is greater." Similarly, TV directors are given credit on TV films, including the video release of such films. The director's name on the screen shall be no less than 40% of the size of the episode or series title, whichever is larger. [Sections 8-301 and 8-303]

As a general rule, theatrical film directors are to receive credit on all paid advertising issued or prepared by the employer in the Continental U.S. [Section 8-203] In addition, a producer of a theatrical motion picture is required to submit to the DGA for approval of a director's credit all press books and paid advertising campaign material prepared by the producer. [Section 8-210]

Theatrical film directors are entitled to have their names on any formal publicity if the name of the picture is mentioned. [Sections 8-204]

Senator DECONCINI. Thank you, Mr. Counter.

On the other hand, when you say you have negotiated, if it were mandatory you would still negotiate, right?

Mr. COUNTER. Right.

Senator DECONCINI. That's what you're saying. If I am correct, it is mandatory in Europe and they negotiate. Is that correct?

Mr. COUNTER. I'm not sure that's correct with respect to the bargaining that goes on in Europe. The bargaining in Europe is far less sophisticated than what we have in the United States.

Senator DECONCINI. OK. Well, let's talk about the United States now. If it were mandatory you would have to bargain for whatever rights you wanted from the artist, of the material. Not having to have to do that now, does that not put you—your industry—in a much better economic position? That's one that you don't have to do? Yes, you let them come in and participate, but they can't veto what you're doing; they can make suggestions. Is that correct?

Mr. COUNTER. I think Congress has chosen to allow the parties to the bargaining process the freedom to bargain out the problem——

Senator DECONCINI. Yes, but if they don't bargain out the problem, what happens? You can go ahead and do whatever you want with the film, right?

Mr. COUNTER. Well, in the absence of some restriction in the collective-bargaining agreement, that is correct.

Senator DECONCINI. Isn't that right?

Mr. COUNTER. That is correct. But I want to emphasize the findings of Congress when these labor laws were adopted, emphasize the fact that the parties should be free to negotiate the terms of their agreement and that the Government should not step in on the side of either party and mandate that a certain provision be contained in a collective-bargaining agreement, or give either side the leverage in that negotiation. The whole concept of collective bargaining is to allow the parties the freedom to negotiate.

Senator DECONCINI. I understand. I agree with that. On the other hand, if you consider any collective bargaining, if it is really absolutely the right of one not to give in, whether it ~~was~~ on moral rights or other collective bargaining agreements, someone can say, well, we're not going to agree to pay insurance health premiums; that's the position our company takes, and there's nothing anybody can do about that——

Mr. COUNTER. Labor's remedy is to withhold services.

Senator DECONCINI. Sure.

Mr. NOLAN. If I might add to that, these motion pictures cost on the average $18 million to $20 million apiece. When a motion picture company like the one I represent makes a motion picture, we have to choose our director very, very carefully. There is basically only a handful of directors that we can go to that we would entrust with that kind of investment.

That being the case, they have a great deal of leverage in terms of demanding things in their own separate contracts.

Senator DECONCINI. Excuse me. That's at the initial employment stage when you employ them? That's when they have their——

Mr. NOLAN. No, it's also afterwards.

Senator DECONCINI. Well, that's part of the agreement that you make with them, right, that they have certain rights under this agreement that you employ them in? Is that right?

Mr. NOLAN. That is part of it but it's not the whole story. The whole story is that you have to go back to that well again because you want---

Senator DECONCINI. You mean for another movie, later?

Mr. NOLAN. Yes. So you have to treat them very carefully. And when they ask you to do something, you consider it very carefully because you might alienate them later on.

Senator DECONCINI. Well, I guess my question to you, Mr. Nolan—both of you—the industry you are in, you hire a director. He creates this based on what you want, or what you tell him in the broad sense, if I'm correct, and when you do this you are doing it for the motion picture screen. He completes that; you spend $20 million and you sell it and you make $100 million on it. Maybe you make $21 million on it, I don't know. But the market prevails. Your company has done so well that you are more apt to be making $100 million on it.

Now, when you want to convert that for the video tapes, what you're telling us is that you have already agreed in the initial collective bargaining agreement with that director that you can do that and he can come in and make suggestions, but he cannot veto it. Is that right?

Mr. NOLAN. That's correct.

Senator DECONCINI. So that is, from your position, already in the so-called free market spirit. He could say "no" then if he wanted to, right? He could say, hey, this is going to be such a film that I don't want anybody ever touching it. He could take that position with you if he wanted to, right?

Mr. NOLAN. That's right.

Senator DECONCINI. Now, to your knowledge, has anyone ever done that with your company? Has anyone ever said, I'll take on this chore; I'll do what you want here, but, by God, this is going to be a masterpiece in my judgment, and I don't want it panned or scanned or anything because it is mine?

Mr. COUNTER. Yes. There are examples—the most notable, Woody Allen insists on letter boxing as opposed to panning and scanning in his individual personal service contracts. Warren Beatty was successful in stopping the showing of "Reds" on broadcast television because of a provision in his individual contract which precluded the cutting of that picture for broadcast.

Senator DECONCINI. So then there is absolutely nothing to keep them from attempting to bargain that at the very beginning?

Mr. NOLAN. That's correct.

Senator DECONCINI. Now, when you're dealing with a Woody Allen or someone who has such a reputation and you want it because it's going to be a market thing and a saleable thing because he's done it, because of his artistic value, that's one thing. How about the beginner in that profession? How does he cope with you when he comes in? You're looking for new people all the time, new movies. You don't just rely on 6, I'm sure, or 10; you are probably looking constantly for directors. What makes it fair for him to deal

with a large company like yours when he's new, he's going to give anything he can to get his name on there and do it, is he not?

Mr. NOLAN. Well, No. 1, if he makes a very good movie for us we will want to use him again.

Senator DECONCINI. That's a good point.

Mr. NOLAN. Second, I just want to make clear that 8 out of 10 movies that our industry makes, the Motion Picture Association companies, do not make a profit in the theatrical market.

Senator DECONCINI. I understand. You make a profit later.

Mr. NOLAN. Right.

Senator DECONCINI. If you make it. I understand that.

OK, I just wanted to get a few things clear in my mind. I will submit some other questions for you because of time constraints.

[Questions and answers, subsequently submitted for the record, follow:]

RESPONSES TO WRITTEN QUESTIONS
TO PETER NOLAN AND NICHOLAS COUNTER
FOLLOWING THE SENATE PATENT, TRADEMARK AND COPYRIGHT SUBCOMMITTEE
HEARING ON "MORAL RIGHTS" IN THE PERFORMING ARTS

SUBMITTED DECEMBER 21, 1989

1. Copyright was given constitutional status in recognition of the important public purpose it is intended to serve. In exchange for granting copyright owners a very limited monopoly over the exploitation of their works, the American public receives the benefit of new creative works; the ability to control these works for a time gives the copyright owner maximum incentive to disseminate the work widely. This enhances American culture and the American economy.

What the proponents of a so-called "moral rights" law suggest, however, is that there be added to the copyright law provisions that would serve only the interests of selected individuals... not the interests of the public as a whole.

Those individuals seeking to introduce "moral rights" concepts into copyright law are non-copyright owners who have neither invested in nor taken any financial risks in the production and dissemination of the creative works they seek to control or censor. These individuals have participated in the production of these works, but they have been paid for their services... now they want even more, in what could amount to a personal windfall at the expense of maximized public access to motion pictures.

The pursuit of "moral rights" undercuts the public good. At the hearing before this Subcommittee, it was clear that the proponents of "moral rights" legislation have no effective answer when asked how the public would benefit from their proposal.

The imposition of "moral rights" concepts in copyright would introduce highly subjective and personal determinations into what is fundamentally an economic framework. That is fundamentally inconsistent with the interest of consumers, and with the purposes of copyright.

2. To the extent that it may be of use to the viewer to know that the version of a motion picture he or she is watching has been adapted in some way for the viewing medium, the marketplace provides that information. We call to the Committee's attention certain prevalent, voluntary labelling undertaken by various users and exhibitors of motion pictures. It is quite customary for the national broadcast television networks to superimpose "Edited for Television" at the beginning of the broadcast of feature films which have been so edited. The Turner organization indicates that it routinely labels its "colorized" motion pictures as such, and indeed promotes them as "colorized" works in order to enhance their market appeal. Moreover, many critics and reviewers of motion pictures exhibited in the various media routinely comment on any adaptations in the version of a motion picture offered to the public and their view of the significance of these adaptations.

Quite simply, the marketplace will ensure that, where a film is adapted for a particular medium in a particular way, the consumer can obtain the information he or she may need to know as to any adaptations made in the version he or she is viewing. Government-mandated disclaimers are unnecessary and unwarranted.

3. We are endeavoring to obtain information for the Committee concerning the status of collective bargaining activity between motion picture producers and guilds in Europe.

4. It is extremely difficult, and of questionable value, to attempt to quantify the number of times "moral rights"-type issues have been brought to the table in collective bargaining between U.S. film producers and the various artists' guilds. Suffice it to say that the guilds representing various contributors to motion picture production have raised and advocated the "creative rights" of their members on numerous occasions, and in some instances have pursued these interests to the point of establishing certain guarantees in their collective bargaining agreements. The extensive and carefully coordinated "screen and promotion credits" requirements (described in some detail in Mr. Counter's testimony before this subcommittee) in the guild agreements reflect this.

From the commencement of a negotiation to its conclusion, the parties may place myriad considerations on the table, and may withdraw them at various times for various reasons. We cannot suggest on the guilds' behalf whether and when they have "negotiated away" anything of value to them in exchange for certain concessions from producers on creative rights issues. But the record clearly shows that the guilds have sought and obtained "creative rights" guarantees in their contracts.

5. The import of this question is that government intervention in the collective bargaining process on behalf of one party tilts the balance in favor of that party. That is certainly the case. The motion picture guilds are powerful, well-organized bargaining units, and are well-matched against their producer counterparts. The guilds are able to bring their collective strength to bear in pursuit of "creative rights" issues just as effectively as they pursue other financial and workplace issues, as is evidenced by the concessions they have secured in each of these areas. The guilds do not need the government's help in securing through legislation rights for which they are fully able to negotiate.

6. A uniform legislative scheme for so-called "moral rights" would only make sense if (i) a legitimate federal objective would be served, and (ii) reliance on various state statutory and common laws fails to fulfill that federal objective. Because the threshold test is not met, it is unnecessary to consider the latter test.

What we have today, in the amalgam of tort, contract, unfair competition and other laws at the state level, are a variety of means whereby certain parties may seek to establish that a right or interest they hold has been impaired by another person's use of a work (which may happen to be copyrighted) to which the claimant may have made some creative contribution. To the extent that a state may choose to create such "moral rights" cognates which are not inconsistent with federal copyright law or other law, and no other federal interest is implicated, there is no apparent reason for Congress to pre-empt state law in this area at this time.

The Congress has wisely chosen to refrain from incorporating the concept of "moral rights" in federal copyright law, while finding that the bundle of rights available under state statutory and common law and certain federal laws (including the Lanham Act) satisfy the requirements of the Berne Copyright Convention.

In the case of motion picture production, there is no demonstrated federal interest to be served by adopting federal "moral rights" legislation. Thus, a federal "moral rights" statute is not warranted. Uniformity of treatment is of no value if the result is adverse to the core principles of copyright.

Senator DECONCINI. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

I assume that the poor fuzzy quality on the video we saw before was because of the equipment and not because of the technology. So we won't hold that against you. We will hold it against the Senate recording studio.

Time compression, that's not done to help or aid the viewing public in any way, is it? That just makes room to fit in more ads and to fit within the normal amount of time that the networks will provide for a movie, is that correct? It's not done to make the movie more enjoyable to you, me, or anybody else viewing it at home?

Mr. COUNTER. Not to make it more enjoyable, to make it fit within time constraints.

Senator LEAHY. Time constraints normally means just making sure they can get the appropriate number of ads in?

Mr. NOLAN. Sure. Otherwise we wouldn't have free television.

Senator LEAHY. I understand.

Mr. COUNTER. And we should emphasize that it's a small percentage. You're talking about 1 percent, to maybe 3 percent at most.

Senator LEAHY. This is also done with shows that are put out for syndication, things like M*A*S*H? They have found that by doing that they can squeeze in another minute or two of ads, even on a half-hour show?

Mr. NOLAN. That I don't know about. Those are made-for-television programs. At least in our company, we restrict the number of commercials and the time that they can put into the shows that we syndicate.

Senator LEAHY. On the panning and scanning question, I have seen some with much smaller bands than the bands that you showed us. Were those bands typical of the amount that you have to have?

Mr. NOLAN. That's what I am told.

Senator LEAHY. OK.

Now, Glenn Gumpel, who is executive director of the Directors Guild, is going to testify later today—in fact, I probably will not hear that testimony because of another hearing that I must attend—but in his written testimony he says, it "is totally erroneous to assert that the producers are compelled by American labor law to negotiate over subjects such as moral rights." He argues that the employers are only compelled to bargain over mandatory subjects of bargaining, such as rates of pay and wages, hours of employment, things like that.

If that is the case, why should those of us in Congress who may be concerned about this issue sit back and expect the normal collective-bargaining efforts to come to the fore?

Mr. COUNTER. Because the proof is in the pudding. We have done it for 40 years. The distinction between mandatory and permissive has not been the issue. The issue is whether the parties have a problem that they want to solve on a mutual basis that is satisfactory to both sides.

Senator LEAHY. But that also depends upon the bargaining power of the particular individual, does it not? I mean, if somebody has a record of having made a couple blockbusters, and he comes to you

with not only a reputation but perhaps even some of the financing, he can negotiate a lot better than someone starting anew. Is that not correct?

Mr. NOLAN. Well, there are two levels of bargaining. The first is the collective bargaining which is done by the guild on behalf of all members. So the first-time director coming out of the film school, doing a small budget movie—we hope—is protected by the Directors Guild agreement provision which provides for the right of consultation with respect to panning and scanning and time compression and expansion——

Senator LEAHY. Some of those small budget movies have done pretty well.

Mr. COUNTER. Yes, that's true.

Senator LEAHY. But the Directors Guild doesn't represent all directors, does it? Or does it?

Mr. COUNTER. Well, our estimate is that about 95 percent of the theatrical motion pictures that are in theaters are done with directors represented by the Directors Guild under the contract that we negotiate.

Senator LEAHY. What do you do for those people who are not represented?

Mr. COUNTER. Frankly, our companies have not had that many dealings with people outside the guild.

Senator LEAHY. Have, or have not?

Mr. COUNTER. Have not.

Senator LEAHY. Have not. Do you know what happens with companies that do deal with them?

Mr. COUNTER. As a consumer, I have seen pictures done—I see the same kinds of credits, and I assume they go through the same process as far as getting those pictures into television.

Senator LEAHY. If you had a director come to you and say, look, I don't want this thing panned and scanned, I don't want it time compressed, and you have two or three other directors, any one of whom in your estimation could do the job, what are going to be his chances to negotiate something like that if you know that one of the other two or three wouldn't make that requirement? As a company, would you not be inclined to say, "why accept any restrictions we don't want?"

Mr. COUNTER. Well, the alternative, if you want to go with that director who insisted that it not be panned and scanned and not be time compressed, would be to put limitations on that director and the cinematographer going in to be sure that only the part that will show up on the television screen is in the center of the focused lens, No. 1. And No. 2, that the running time of the movie fits within the time constraints that will be necessary for broadcast television. You could do that going in as opposed to doing it after the fact.

Senator LEAHY. So what you're saying——

Mr. COUNTER. And that would impact the creative decisions of the director, which we would not like to do, frankly.

Senator LEAHY. So, Mr. Counter, what you are saying is that if you are going to be making a film, as a producer, you are always going to make that film with the idea that you're going to put it into a different medium eventually? The film won't be shown just

in the theater, disregarding my comments about how theaters are going? I mention that only because I hope the industry itself will start putting some pressure on some of these——

Mr. COUNTER. Well, Mr. Valenti has been working on that, as a matter of fact.

Senator LEAHY. Well, Mr. Valenti has the best theater in town. Recently, they showed Lawrence of Arabia in a good theater here in Washington—that magnificent restoration of a classic film. We saw it the way it was supposed to be, and what a wonderful thing it was. I remember talking to Mr. Lean afterward, and he was saying how great it was to actually see it in the kind of theater he had in mind and with the kind of projection and sound system he had in mind when he made it.

I don't mean to digress. I just want to make sure that I understand. Is it accurate to say that most companies, when they make a movie, are thinking, just as a pure business proposition, that they're going to have to be able to go somewhere other than a movie theater with that movie, most notably into videotape and television and airlines if they can sell it?

Mr. COUNTER. Yes. The economics of the business have changed dramatically, the results of which are that these theatrical aftermarkets are absolutely essential and have become the primary markets necessary to finance and develop additional motion pictures. So we are totally dependent on these aftermarkets for the future of the business.

Senator LEAHY. And then you think about what some of those aftermarkets do to even a restored copy of Lawrence of Arabia, to use that as one example.

Mr. NOLAN. One additional point here. The guilds and unions rely on those aftermarkets as well. That's where a good percentage of their money comes from for their health and welfare funds.

Senator LEAHY. You anticipated my next question. And the reason I raise these questions is to point out that the economy of this whole industry has gotten to such a point that sometimes an absolute position wars with what is economic reality. We're trying to figure out how you can bring the two as close together as possible.

Incidentally, do colorizers unfairly profit from somebody else's work product and reputation?

Mr. NOLAN. I'm sorry, could you repeat that?

Senator LEAHY. Do you have any thoughts about whether colorizers of black-and-white movies unfairly profit from somebody else's work product and reputation?

Mr. NOLAN. They are providing a service. They don't get any percentages or anything like that. They are just a normal service organization.

Senator LEAHY. That's your estimate of it, Mr. Nolan?

Mr. NOLAN. That's right.

Senator LEAHY. Mr. Counter?

Mr. COUNTER. Well, I think Mr. Mayer can address that subject later on this morning.

Senator DECONCINI. That's a good out.

Senator LEAHY. I am resisting the temptation to follow up on it. I would just ask one last question.

What legitimate rights should artists, such as directors and screen writers, have in their work? How far should those rights go? Should they be only what they have actually contracted out for? Should that be the limit?

Mr. COUNTER. My view is that the collective-bargaining process and the individual negotiation process are far more flexible and easier to adapt to the needs of all the parties. Bear in mind, we have to balance the interests of the writer, the director, the cinematographer, the art director, all the people who contribute to the making of motion pictures. I would submit that's a very difficult task; that's why you see these gray hairs.

Senator LEAHY. I'll take them any color I can get them. [Laughter.]

Colorization is not necessary for either you or me, I guess. But go ahead.

Mr. COUNTER. Right. But at least we have the ability to deal with it with the people that are directly involved in the process when we deal with it in collective and individual negotiations, as opposed to legislation.

Senator LEAHY. I hope you understand, and I know the chairman does, that all of us respect this unique American art form. We want to see it prosper. I shudder when I see the sale of Columbia to Sony. It's just a personal feeling. I don't mind competition from other parts of the world, but I want to see us able to compete in this area, one I find extremely enjoyable. I hope you understand that all of us in Congress take this issue very seriously. You and the other panels say that it is a very, very difficult issue. We are wrestling with it. I have come up with half a dozen great solutions in my own mind, and each one of them, as I think of them longer, has some flaws, so I try to develop another one.

I appreciate the testimony of both of you.

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator Leahy.

The Senator from Iowa?

Senator GRASSLEY. Mr. Chairman, I request that my statement is put in the record.

Senator DECONCINI. Without objection, it will appear at the appropriate place in the record.

Senator GRASSLEY. Evidently we do have time to submit questions for answering in writing?

Senator DECONCINI. Indeed.

Senator GRASSLEY. We often hear the view that if we pass legislation dealing with moral rights, it is going to keep the newcomers from getting started in the movie business.

Do you make that argument, in regard to unknown and struggling directors, that if we pass moral rights legislation, somehow it is going to keep the new director from breaking into the business?

Mr. COUNTER. Well, it is difficult to speculate because we have not had the system imposed by legislation; we have dealt with it through collective bargaining. But in terms of the way the collective-bargaining agreements have worked, they have not precluded the entry of new persons into the field. As Mr. Nolan pointed out, you obviously would hesitate to entrust a large budget motion picture to someone who just graduated from film school; however, it

has been done, and there are many successful stories of successful theatrical directors who have come right out of film school and done quite well.

Let's bear in mind that each of those directors did do their first picture once, so at some point in their career they had their first picture.

Mr. NOLAN. Senator, if I might address that, we can look to some of the problems that have resulted in Europe because of their very strict and very broad moral rights legislation. There has been testimony by Europeans before a House subcommittee on the Berne Convention to the effect that there was a causal connection between the lack of vibrancy of their film business as opposed to the United States because of moral rights.

I can't show you or quantify that. I can tell you that investors here in the United States would undoubtedly be concerned about the ability of someone to exercise a veto right to go into some of these aftermarkets. I think there is the possibility that there could be less motion pictures. Producers like Disney, that I represent, would be very reluctant to go with an untried director, where you have an unknown and where you might not be able to recoup investments in an aftermarket.

So I think there is that possibility. I can't prove it to you, though.

Senator GRASSLEY. Mr. Chairman, I will submit other questions for the record.

Senator DECONCINI. Thank you, Senator Grassley.

Gentlemen, thank you.

Mr. Nolan, if you want to put in the balance of your statement, we will be glad to have it. We're just running out of time here. I do appreciate your presentation here.

Can I just ask you one last question on time compression? I missed this if it was in there. How much time was compressed between scene one and scene two of "Tough Guys"? Do you remember?

Mr. COUNTER. I don't have a figure on that, but I can get it for you.

Senator DECONCINI. All right, just out of curiosity, whether it was a second or two seconds——

Mr. COUNTER. Well, I think the high point in the industry, I am told by technicians, is no more than 5 percent.

Senator DECONCINI. Of the total, that is compressed?

Mr. COUNTER. Of the total.

Senator DECONCINI. I see. Thank you.

Our next panel is composed of Mr. Milos Forman, a motion picture director, representing the Directors Guild of America; Mr. George Stevens, Jr., a filmmaker and founder of the American Film Institute, the John F. Kennedy Center for the Performing Arts; and Mr. Glenn Gumpel, National Executive Director, Directors Guild of America.

I assure all of you that your full statements will appear in the record. Because of the number of questions that I have, I am going to ask that some of them be submitted, if you would be so kind to answer them for us, because of time.

Mr. Forman, please.

STATEMENT OF MILOS FORMAN, MOTION PICTURE DIRECTOR, REPRESENTING THE DIRECTORS GUILD OF AMERICA

Mr. FORMAN. Mr. Chairman, members of the committee, this is my second time testifying in the Senate regarding motion picture protection, so allow me not to repeat everything that I had to say the first time and concentrate only on a few points which are, in my opinion, important in this case.

First, I do not want to argue if a work of art can or cannot be altered. Anything created by man can be altered. We who are privileged to work in creative fields are, in fact, during the process of working, altering and changing our films, books, music, paintings constantly because we want to achieve results as near to perfection as humanly possible. Yes, the financial incentive of our rewards is important, but the real and most important reason for our obsession with perfection is in our pride. These are our names out there for everyone to see and judge.

When one of my films, the musical "Hair," was sold to 115 syndicated television stations and shown to millions of American viewers, I watched helplessly as my pride as a filmmaker was being taken away from me piece by piece. Nine entire musical numbers and numerous bits and pieces were removed from the film by somebody, but the film still bore my name, a Milos Forman film. And nowhere among the credits could you find the name of a person or persons who ordered or executed the recutting and, consequently, the rewriting and redirecting of the film. And I am not sure it was not out of modesty that these individuals didn't put their names up there. It is usually a feeling of doing something profoundly wrong which prompts people to hide their names and, sadly enough, it is the American law which protects these people and not the artistic authors. And yet, strangely enough, we all want the same. We all want our work to be seen by as many people as possible. We want our producers to sell our films everywhere.

The same film "Hair," I mentioned before, was sold a few years later to American network television. But because in the case of the sale to network television my individual contract protected me from any alterations of the film without my approval, the distribution company of MGM-UA had to show me this particular television version. Yes, everything which could have been offensive to family viewing was removed from the film. But whoever did the job did it with such care and intelligence that the film didn't lose its narrative line and its style, and my vision of the story came across intact and I happily approved this version.

I am telling this here just to remind us of one fact. It is only human that if our producers, distributors and exhibitors, through whose hands our work must travel to reach the audiences—if they are not afraid that they could be called answerable for incompetent, shabby, insensitive—and thus, in its result, damaging—work, they just don't make the effort. They just don't. And let's be realistic, why should they? By nature their integrity and reputation in society are predominantly judged by the amount of dollars earned. On the other hand, the integrity and reputation of the artistic authors is predominantly judged by the amount of tears, laughs,

thoughts and emotions we are capable of invoking in our audiences' hearts and minds.

This is a dilemma which art and business always face when their interests collide. This is a dilemma which will never be solved, but which can be brought down to a civilized level if American law will clearly state that no alteration can be performed on a work without the author's consent and approval. And if—God forbid—it is still done, then at the very least, as an incremental step, the authors should have undeniable right to withdraw, together with the title, his or her name from such altered work. Such work is not any more identical with the original and, thus, its distribution might be detrimental to the authors' integrity and reputation.

Now, the second point. There are two arguments by MPAA which are interesting. The first one claims, that the European film industry is indeed in crisis because of the respect European law has for moral rights. As a result of such laws, the producers, distributors and exhibitors are often prevented from doing whatever they deem necessary to assure the widest exploitation of the films.

Well, if the problem is so simple, one assumes that here in the United States so far we have nothing to worry about. Our producers, distributors, and exhibitors have a free hand to do whatever they think will boost the film's exploitation, including the alteration of films.

But according to the next MPAA statement, obviously something must be going wrong. MPAA claims that two-thirds of American films are losing money. Now, with the European reason for the crisis missing here, one wonders why, but the statement doesn't elaborate about that.

Well, I think both statements are—excuse my language—absurd. First, if two-thirds of American films were really losing money, I assure you that we would see a lot of our producers in Las Vegas because the odds are definitely better there.

I think that MPAA is just telling us only half of the truth. Yes, it might be possible that if you count the theatrical receipts only, you will find out that two-thirds of the films remain in the red. But today, practically every film has guaranteed exploitation in other markets—network television, syndicated television, cable television, video cassettes, laser disks, et cetera, et cetera. And if you combine the moneys from all the markets I am sure that the figures will be much more optimistic.

By the way, the magazine Variety is jubilant because last year was Hollywood's best ever. And according to the same publication, this year will be even better.

Now, what about the Europeans? Yes——

Senator DECONCINI. Mr. Forman, I'm going to have to ask you to summarize and conclude your remarks, please. Can you finish up in just a minute or two?

Mr. FORMAN. Oh, yes. Let me come to the end, to summarize briefly why we are here.

We, the members of the Directors Guild, are very proud to continue the work of D.W. Griffith, Cecil B. DeMille, John Ford, George Stevens, Ernst Lubitch, Frank Capra, and many, many others who throughout this century developed something which at the beginning was considered just a mere circus attraction into the

most welcomed, admired, and loved ambassador of American culture all around the world, the American film. That's why we are all very deeply distressed to see how this proud ambassador of American culture, when he comes back home into the living rooms of the American people, is again reduced to the status of circus attraction, how he is defaced, artificially colorized, and chopped like a sausage on a butcher's block.

That's why we, the members of the Directors Guild, are turning to you with hope that you can find a formula to protect this most popular phenomenon of American culture, the American film, from defacement.

Thank you.

[The prepared statement of Mr. Forman follows:]

DIRECTORS GUILD OF AMERICA

STATEMENT OF MILOS FORMAN

BEFORE THE

SUBCOMMITTEE ON COPYRIGHTS, TRADEMARKS, PATENTS

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

OCTOBER 24, 1989

Mr. Chairman, Members of the Committee:

I am pleased to appear before you today to discuss moral rights and motion pictures. We, at the Directors Guild of America (DGA), believe that motion pictures deserve protection and that a system of moral rights protecting motion pictures ought to be established.

This hearing is a continuation of the unfinished business of the Berne Treaty. Passage of Berne was held up last year until an agreement was reached providing for a set of hearings relating to artists rights. Two of those hearings have taken place. One related to moral rights protection for painters and sculptors through a bill pending in the subcommittee from Sen. Kennedy. The second hearing dealt with the work-for-hire situation, and legislation proposed by Sen. Cochran.

This third hearing is devoted to movies and moral rights, and it brings before the subcommittee more complex matters and ones that are more politically sensitive. By that I mean that the motion picture producers and other spokesmen for copyright interests flatly reject moral rights in relation to

film, despite the fact that they passionately supported our adherence to Berne, which fundamentally concerns itself with moral rights. We have skated into Berne on the heels of these kinds of obvious contradictions. And the passion against moral rights by producers is full-blown, despite the fact that Berne does not prevent the defacement of film. It gives the creative author, the victim of these defacements, the right to object, and it gives a neutral judge the right to decide whether damage has been done to the plaintiff's honor or reputation. What could be more fair?

Curiously, this subcommittee has taken a good deal of testimony opposing moral rights in motion pictures at the previous two hearings, even though the ostensible subject was different. Why? Because it is perceived that the economic stakes are higher and that the business of motion picture making or publishing magazines or developing and licensing software would be jeopardized.

Expanding Artists Rights: Congress Takes A Look

The theme of widening artists' rights is what lies behind this series of hearings. While the complexity of issues that may be faced increases when you move from the world of the visual arts to movie making, protection of the artistic product and the vision of the creator is what is at stake when you talk about moral rights.

Some witnesses testifying on the Kennedy bill argued against moral rights in relation to motion pictures, but gave a back-of-the-hand endorsement to the Kennedy legislation. Painters and sculptors could enjoy moral rights protection on a federal level, they suggested, but this business of moral rights had to be contained, lest the enormously fruitful world of copyright industries disintegrate.

There is something in the moral rights debate that turns the adage "What's good for the goose is good for the gander" on its head. "There ought to be moral rights for the visual arts but not for the movie arts." "We ought to join the Berne Treaty, because we lead the world in the protection of copyrighted works and because Berne membership gives us a tool to staunch the piracy of these works, but we ought not to assume the responsibilities of the Berne Treaty in so far as Article 6 bis." Even Congress had to jump through intellectual hoops in order to rationalize passage of the Berne Implementing Amendments. U.S. law now formally embraces "moral rights," although in a bargain basement and piece-meal format. There is to be no explicit federal recognition of moral rights, only limits of it in contract and libel law, the Lanham Act, and derivative rights of copyright law. Added together, these precepts meet some "minimal" quotient of moral rights. We believed last year, and we continue to believe today, that U.S. law, in any of its bits and pieces, is clearly insufficient to provide for moral rights.

The DGA goes further than the Copyright Office, whose report calls on Congress to consider seriously establishing a unified system of moral rights. We think Congress should act promptly and decisively. It should pass legislation to enhance artists rights and to place moral rights properly in U.S. law. We believe that this legislation should be developed genre by genre without discrimination against one art form or another because the problems of developing legislation are more or less complex. The visual arts and the film arts are equally worthy of protection. Moral rights legislation should address the special issues faced by painters and sculptors, writers, those involved in magazine publishing, as well as filmmakers.

Authorship and Reputation in Filmmaking

There is still a question in some people's minds as to who is or are the principal artistic author or authors of a film. Is it the director? Is it the original writer of a novel or a play on which a film might be based? Is it a screenwriter? Aren't we disregarding also the contribution of all the other artistic contributors, cinematographers, editors, costume designers, set designers, performers, composers: Shouldn't these artist also be entitled to the same protection for their creative work? There is no doubt that the contribution of all these artists is enormous! But they are not the principal architect of a movie. The principal architect of a movie are the film's director and film's principal screenwriter. It is their vision

which is decisive in telling a story on film. You can give the same story to two different directors. And you can ask both of them to use the same cinematographers, costume designers, set designers, you can even ask them to use the same actors and you will still end up with two very different films, one of which might make you fall asleep, while the other one might move you to tears, make you laugh, lift your spirits and enlighten your thoughts. And there are plenty of examples in the history of cinema to illustrate this contention.

I do not want to argue if a work of art can or cannot be altered. Anything created by man can be altered. We, who are privileged to work in creative fields, we are, in fact, during the process of working, altering and changing our films, books, music, paintings constantly because we want to achieve results as near to perfection as humanly possible. Yes, the financial incentive of our rewards is important, but the real and most important reason for our obsession with perfection is in our pride. These are our names out there for everyone to see and judge.

When one of my films, the musical "Hair," was sold to 115 syndicated television stations and shown to millions of American viewers, I watched helplessly as my pride as a filmmaker was being taken away from me piece by piece. Nine entire musical numbers and numerous bits and pieces were removed from the film by somebody. But the film still bore my name, a Milos Forman

film. And nowhere among the credits could you find the name of a person or persons who ordered or executed the recutting and, thus, subsequently rewriting and redirecting the film.

I am telling this here just to remind us of one fact: It is only human that if our producers, distributors and exhibitors, through whose hands our work must travel to reach the audiences, if they are not afraid that they could be called answerable for incompetent, shabby, insensitive and, thus, in its result damaging work, they just don't make the effort. They just don't. And let's be realistic: Why should they? By nature, their integrity and reputation in society is predominantly judged by the amount of dollars earned. On the other hand, the integrity and reputation of the artistic authors is predominantly judged by the amount of tears, laughs, thoughts and emotions we are capable of invoking in our audiences' hearts and minds. This is a dilemma, which art and business always face when their interest collide. This is a dilemma which will never be solved, but which can be brought down to a civilized level, if American law will clearly state that no alteration can be performed on a work of art without the author's consent and approval.

Proposed Legislation and Current Legal Status

Unlike the previous two hearings, no legislation is pending today. Last session, legislation was introduced in the House of Representatives by Representative Gephardt, H.R. 2400, which sought specific protection for motion pictures. And, as

this Committee knows, the Directors Guild amplified its legislative views in testimony on Berne.

We have stated that the principal director and principal screenwriter are the primary artistic authors of a motion picture, and that it is they who should be given rights to assert against the defacement of their work. We have just outlined the reasons why we believe this is so. The notion of the director and screenwriter as principal artistic authors follows a pattern of law established in Europe and among other Berne member countries.

We have suggested that legislative language be drafted to clarify that moral rights would obtain only after theatrical release. No changes would entail to the production phase of movie-making.

Moral rights, in so far as motion pictures, ought to be alienable, in accord with traditional American contract law. For instance, some filmmakers have stated publicly before Congress that they might agree to the "colorization" of their work. Others would not agree. The choice should rest with the film's creative authors -- the principal director and screenwriters.

The traditional employer/employee relationship between producers and directors ought to remain intact. The Guild seeks nothing that would modify the work-for-hire doctrine. There should be no remuneration to directors or screenwriters for waiving their rights.

Thus, these are the broad outlines of what we propose legislatively in order for moral rights to reach to motion picture protection. Legislation must be developed because U.S. case law has not evolved as a bar to film defacement. Copyright law does not protect the integrity of films or recognize moral rights. Gilliam v. ABC, 538 F. 2d 14, 24 (2nd Cir., 1976). To the contrary, we believe that an analysis of cases touching on film defacement would conclude that moral rights has made little headway in the U.S. See, Report of the Register of Copyrights, Technological Alterations to Motion Pictures 90-96 (1989). Senator Hatch specifically argued last year that nothing in the passage of Berne could be construed to expand moral rights, ever. Federal judges have said moral rights is incompatible with U.S. law. It is for Congress to act, and we hope it will do so expeditiously.

A Foreign Element

We believe there is some urgency in acting. The work of the colorizers, the lightning-rod grievance that brought the Guild to Washington, goes on unabetted. The truth of the images of our cultural heritage is obliterated. Mr. Turner has never understood that black-and-white film is a palette, not a limitation. Mr. Turner is quite right from a legal standpoint to gloat that "he owns these movies and can do whatever he wants with them." He is quite wrong morally. He is quite wrong from

the point of view of a civilized society which wishes to transmit images of its past in a faithful rendition.

How do Members of Congress feel when their remarks are misquoted or taken out of context? Outrages! And how will Members feel when their speeches are altered electronically to change meaning or emphasis. The capacity is at hand. Outraged, of course! Well, we feel the same way.

Now just in the last weeks, we have the reality of foreign control of one of our great motion picture studios. The history of motion picture studios having some kind of custodial regard for the work they produce is bleak indeed. Are we to suppose that foreign owners of American cultural products will be more sensitive to these matters?

Look into your hearts? Is the Sony Corporation of Japan the author of the Bridge on the River Kwai? Or is David Lean? Is the Sony Corporation of Japan the author of From Here to Eternity? Or is Fred Zinnemann? Is the Sony Corporation of Japan the author of <u>The Last Emperor</u>, from which the depiction of the rape of Nanking was excised in Japanese distribution? Or is the author Bernardo Bertolucci? We believe that authorship has to do with a creative vision, not with the shuffling of papers and the transfer of dollars, and obviously, we believe that the specter of foreign ownership of the major U.S. motion picture companies is unsettling on many levels.

The buyout of Columbia Studios brings sharply into focus some of the very issues we have been talking about, issues relating to authorship, historical truth, the preservation and presentation of the original work, and the value to society of the integrity of our culture. But moral rights could serve as a bulwark against abridgements and falsifications.

The Washington Post recently published a story about a famous photo of Lenin addressing a crowd. The original photo includes the picture of two of Lenin's colleagues who fell into disfavor with Stalin. A companion photo, published by Stalin's press, has these foes' images airbrushed away. History was rewritten by altering images. While this sort of thing can be done in film, Congress should give the original creators of the film, the director and the screenwriter, the right to preserve and protect the authenticity of their work.

One of the points of moral rights systems is to ensure that the original image is transmitted through time as it was originally created. As we say, there is urgency in the consideration of moral rights for motion pictures, not only because of the obvious abuses at hand, like colorization, but because of potential abuses of distortion and censorship that may lie just ahead.

Financing Questions

And finally there are two financial arguments advanced by MPAA which merit reply. The first one claims that the

European film industry is indeed in crisis <u>because</u> of the respect European law has for authors' moral rights. As a result of such laws, the producers, distributors and exhibitors are often prevented from doing whatever they deem necessary to assure the widest possible exploitation of the films.

Well, if the problem is so simple, then those in the United States so far have nothing to worry about. Our producers, distributors and exhibitors, they have a free hand to do whatever they think will boost the film's exploitation, including the alteration of films. But, according to the next MPAA statement, obviously something must be going wrong: MPAA claims that two-thirds of American films are losing money. Now, with the European reason for the crisis missing here, one wonders why? But the statement doesn't elaborate.

Well, I think both statements are, excuse my language, absurd. First, if two-thirds of American films were really losing money, I assure you that we would see a lot of our producers in Las Vegas, because the odds are definitely better there. I think that MPAA is just telling us only the half of the truth. Yes, it might be possible that, if you count the theatrical receipts only, you will find out that two-thirds of the films remain in the red. But, today, practically every film has guaranteed exploitation in other markets: Network television, syndicated television, cable television, video cassettes, laser disks, etc., etc. If you combine the moneys

from all the markets, I am sure that the figures are much more optimistic. By the way, the magazine "Variety" is jubilant because last year was Hollywood's best ever. And according to the same publication this year will be even better.

Now what about the Europeans? Yes, these times are not their best years. But is it because of their respect for moral rights? Well, the toughest laws protecting these rights were adopted in 1957 in France. And the results? The following decade, the 60's, was the most lucrative post-war period in the French film industry artistically and commercially. We at the Directors Guild, we just cannot accept that the health of the American cinema depends on denying the protection of moral rights to American authors.

Summary

So finally to summarize briefly why we are here. We the members of the Directors Guild are very proud to continue the work of D. W. Griffith, Cecil B. D. Mille, John Ford, Ernst Lubitch, Frank Capra and many, many others who throughout this century developed something which at the beginning was considered just a mere circus attraction into the most welcomed, admired and loved ambassador of American culture all around the world - the American film.

And that's why we are all very deeply distressed to see how this proud ambassador, when he comes back home, into the living rooms of the American people, is again reduced to the status of circus attraction, how he is defaced, artificially colorized and chopped like a sausage on a butcher's block.

That's why we, the members of the Directors Guild, are turning to you with hope that you can find a formula how to protect this most popular phenomenon of American culture - the American film - from defacement. Thank you.

Senator DECONCINI. Thank you, Mr. Forman.
Mr. Stevens.

STATEMENT OF GEORGE STEVENS, JR., FILMMAKER, JOHN F. KENNEDY CENTER FOR THE PERFORMING ARTS

Mr. STEVENS. Mr. Chairman, in anticipation of this hearing I was trying to find a way to articulate the kind of complicated reasons why we who make films feel that it is important that the author have a voice when the films are changed. It is very difficult to do.

But then I see that the Motion Picture Association and the National Association of Broadcasters spent $50,000 or $75,000 to make this little film which demonstrated it for us. Here are people, without the filmmakers involved, trying to do an illustration to show you, the committee, to show that these films can be changed without the creative people involved. The whole point of it is that you're going to be able to read the newspaper after they fix the film up.

We see on the screen here, for all the panning and scanning, that they say, "Now you can read the newspaper," and you can't read the newspaper. If Mr. Forman is involved in reshaping the film for television, it will be done in a way where the film will continue to communicate as the filmmaker made it.

I am here, listening to your questions, to urge that there is a shift possible in the balance between the copyright holders and the people who make films, but I am here to say that it should be done in the interest of the American people.

Much of the discussion here today has been about contracts that can be negotiated. I am here, speaking for myself—and in a way for my father, who made films—to defend those first-time directors like John Huston, when he made "The Maltese Falcon" and did not have the authority or the leverage. He needed the opportunity. He could not go in and say to Mr. Warner, "Put it in my contract that my film will never be changed." So in his last year of his life he sees his "Maltese Falcon" changed, and he is impotent. He is unable in any way to defend what is really a masterwork.

I know that this is a complicated issue, and finding a solution or a middle ground that protects the films and protects the interest of the American people in this cultural heritage will be difficult. But I suggest it is worth doing.

The argument has really been framed on two extremes. Jimmy Stewart said, "It is wrong to butcher these films, that were made with such care, just plain wrong." Ted Turner said, "The last time I looked, I owned these films, and I can do whatever I want with them." Those statements frame the issue.

Nobody would question that Mr. Turner currently owns distribution rights to the MGM films, but does this give him or any other copyright holder the right to alter—or, should he so choose—to destroy these films? "Destroy" sounds like a strong word, but in the 1930's and 1940's and 1950's, the film companies often melted down the original nitrate negatives of motion pictures because they felt the silver content in those negatives was worth more than the films themselves.

We have just had the library of Columbia Pictures sold to a foreign company. That's why I refer in my testimony in the terms of "Mr. Smith Goes to Tokyo." One of Jimmy Stewart's most memorable films, "Mr. Smith Goes to Washington," is now owned by a foreign corporation——

Senator DECONCINI. But so are some banks and some major trading companies and insurance companies. A lot of things are owned—should we stop that?

Mr. STEVENS. I think if a bank were to fold, there is another bank to take its place. I think if "Mr. Smith Goes to Washington" and those other American films were to disappear, to go abroad and at some later point not be able to be returned, no negative to be protected, that we really lose some of our cultural heritage. I think there is a public interest which has to be measured alongside the economic interests—economic interests which I assure you Mr. Forman and I are sympathetic with because we are in the profession of making films.

Senator DECONCINI. Go ahead.

Mr. STEVENS. I would just like to put it in the frame of why I care—and I think the retrospective issue is a very important one here—why I care so much about this. I was both the son and a colleague of my father, George Stevens, who made such films as "A Place in the Son," "Shane," "Giant," "The Diary of Anne Frank," "Gunga Din," "Alice Adams"—I worked with him. I remember in 1951, coming home from the Academy Awards ceremony; that was the year of "A Place in the Sun," and it had won many awards, including his for best director. He was driving the car, and in the seat between us was the Oscar. I was quite excited, about 17 or 18 years old—perhaps in his eyes, too excited—and he turned to me and he said, "You know, we'll have a better idea of what kind of a film this is in about 25 years." He was a man who made films because he understood that they had some lasting and enduring value if they were well made.

He made "A Place in the Sun" in black and white. I was there. He made the choice—not as you will hear from others, that for economic reasons he couldn't afford not to make it in black and white—he made it because of the kind of story it was. His next film, "Shane," he would make in color; the next one after that, "Giant," he would make in color; and then 10 years later, in 1957, he was about to make a picture called "The Diary of Anne Frank." He chose to make it in black and white for only one reason, because he felt that that story would be better told in black and white.

He is no longer here to defend those films, but the idea of colorizing "A Place in the Sun"—or as they are now doing, "Gunga Din"—Stanley Cortez, a great cinematographer, is in this room and I hope you have the opportunity to ask him the difference between photographing a film in color and in black and white. And when Cary Grant says, "Oh, bugler, gold, gold," your eye doesn't go to gold; it goes to black and white, but you see gold. And that is the way that George Stevens and his cameraman, Joe August, in 1939 conceived that film.

I think that these films are deserving of protection. The argument that more money can be made if they are colorized does not

seem to me to be a satisfactory one, because maybe more money could be made if nude scenes were inserted into them, any kind of alteration. These films have made money for their companies steadfastly over the years, and I argue— really, in my father's memory—that the films that he made should remain the way he made them, and have an opportunity to be seen by the public and future generations in that form.

Thank you, sir.

[The prepared statement of Mr. Stevens follows:]

Testimony of George Stevens, Jr.

before the

Subcommittee on Patents, Copyrights and Trademarks

on

Copyrights, Moral Rights in Films, Television and other Performing Arts

October 24, 1989

"Mr. Smith Goes to Tokyo"

We despair when great cities are obliterated by uncontrolable acts of war or by acts of God or by neglect. We should despair also when a nation allows the degradation, distortion or deportation of the artifacts of its culture.

I am here to urge this committee to take action that will safeguard a cultural legacy of the United States - the movies that captured, like no other art form, the vitality and creativity of America's twentieth century.

I know that this is not a black and white issue. Like so many questions that Congress faces this one has well articulated and conflicting points of view.

Jimmy Stewart: "It is wrong to butcher these fine films that were made with such care. Just plain wrong."

Ted Turner: "The last time I looked, I owned those films and I can do whatever I want with them."

Those statements frame the issue. No one would question that Mr. Turner currently owns distribution rights to those films, but does this give him or any other copyright holder the right to alter, or should he so choose, to destroy these films? Or when another of the owners of a great library of American film classics decides to sell out to a foreign corporation, should not the people of the United States have some legitimate interest in how their cultural heritage is disposed of?

Two weeks ago one of Jimmy Stewart's most memorable films, Mr. Smith Goes to Washington, was sold to a Japanese corporation along with the entire library of motion pictures produced by the Columbia Pictures Corporation over the last half century. Who protects the interests of the people of the United States when it comes to these motion pictures? How will future generations judge us if we allow these expressions of the American spirit to be lost to us.

I remember the moment when I first grasped the idea that movies had some enduring importance, that they were more than a Saturday night at the Orpheum. It was in an automobile driving home from the 1952 Academy Awards in Los Angeles. The driver was my father whose film A Place in The Sun had been honored that

night with many awards, including his for Best Director. The Oscar was on the seat between us and I was eighteen years old and quite excited, perhaps too excited in my father's eyes. He turned to me and said, "You know, we'll have a better idea of how good a film this is in about twenty-five years."

Ever since that night thirty-seven years ago I have believed that the "test of time" is the ultimate measure of a motion picture's worth. That belief caused me to become passionate about the importance of preserving films for their value as a record of our civilization and as inspiration and entertainment for future generations.

A Place In The Sun has stood the test of time as a work of art in the eyes of writers and historians. The haunting black and white image of Elizabeth Taylor, looking into the eyes of Montgomery Clift as he awaits his fate on death row, is indelible in our minds and hearts. It is so because my father made the creative choice in 1951 to film A Place In The Sun in black and white. It was not an economic choice - it was a deliberate and wise creative choice.

My father's dream that his film would live to be seen by future generations is now in jeopardy. A stranger in search of a short term gain, may elect to color those images, to give the faces of Montgomery Clift and Elizabeth Taylor the pink lines of

colored Easter eggs, robbing A Place In The Sun of the vibrant light and shade that is its artistic essence. As my father's friend Jimmy Stewart says: "That is just plain wrong".

I believe that we have a responsibility as citizens of a great nation to preserve the records of our time and to insure that our motion picture classics continue to exist and to be shown in the form that their creators devised for them - and only in that form.

It is a sad fact of the moviemaking system - which is a shotgun wedding between art and commerce - that the men who controlled the purse strings of this industry were, with very few exceptions, so concerned with profits that they neglected their responsibility to the art and culture contained within the "property" they managed. A generation ago many of the companies that produced the great film classics chose to melt down the original negatives so as to rescue the silver nitrate content - which they calculated to be more valuable than the films themselves.

Should owning the copyright of a collaborative work of art entitle one to destroy it? Or is there a public interest that should be protected?

Columbia Pictures, MGM and United Artists are in the process of being sold to foreign owners and this complicates the problem. We must ask ourselves, are we content to have the fate of the original negative of Mr. Smith Goes to Washington in the hands of a corporate executive somewhere in Asia? I believe everyone here agrees that an enlightened nation protects its history and its culture, so, the question is how do we save America's motion picture and television heritage from the ravages of colorization, panning and scanning, the truncating of films for broadcast on television or cable and the transfer of ownership overseas.

This is a subject of special concern to those of us who have over the past two decades fought, sometimes against the neglect and disinterest of the copyright owners themselves, to preserve America's film heritage. We did it not for financial gain but for our children and our children's children for whom we wish to insure the opportunity to enjoy these films in the future - if they are not mutilated so as to prevent them from being seen as they were conceived by their makers.

We address this question to the Congress because private enterprise has demonstrated an unwillingness to deal with it. We do so in the same spirit that the public supported the Congress when it acted to protect our parklands and historic buildings.

I am sure you will hear, as the legislators heard who protected America's parklands, that the government should not interfere. I am sure, also, you will recognize that the people urging you not to interfere are the familiar faces who are in your offices on other occasions asking you to intervene.

We, the filmmakers, are asking you to intervene not on our behalf as individuals, but on behalf of the American public - your constituents and their descendants to whom, in the last analysis, our cultural birthright belongs.

I have a special concern for the safety of what I regard to be the "classics".

The United States of America spawned a new art form in this century and brought forth a filmmaking tradition consisting of great filmmakers and great films unmatched by any nation. This era is known the world over as the Golden Age of Movies and it encompasses the work of artists like D.W. Griffith, Charlie Chaplin, Harold Lloyd, Buster Keaton, John Ford, Orson Welles, William Wyler, John Huston, Frank Capra, Billy Wilder, Alfred Hitchcock and George Stevens.

The cumulative work of those men, and others of lesser reputation, may prove to be the most vivid and unique visual, social and artistic record of any nation in the history of

28-054 - 90 - 36

mankind. How foolish we will seem if we allow this legacy to be colored, panned and scanned and truncated, or sold to foreign owners, so that future generations of Americans will not see these works in the form they were conceived. I believe that the reason the work of these men is valued today, half a century after it was created, is because they were the strong and the talented ones who fought for and had the authority to make their films in their own vision. So it is important that their vision be the one that is preserved and the one that is seen, not the vision, or the absence of vision of the hired technicians who are engaged to coat these films with color, or to alter every single frame by panning and scanning, or to delete scenes to enable the films to be sandwiched in between commercials and to fit an arbitrary time period.

As a great democracy we should be able to devise the means to balance the economic appetites of the copyright holders and broadcasters with the public interest.

John Huston and Frank Capra and Billy Wilder lived long enough to observe the insult of colorization (or the "impudence" as Mr. Huston called it) and to denounce the technicians who distort their work. I knew most of the other filmmakers named herein and I can assure you that there would be storms in the heavens if these bastardized versions of their work were screened in the great projection room in the sky.

One of these men declared himself on these matters before passing on. I located a transcript of a press conference that George Stevens, Sr. held on October 26, 1965 at the time he sued Paramount Pictures and the National Broadcasting Company in the Los Angeles Superior Court charging them with violation of his contractual rights that assured that his film, A Place in The Sun, not be cut, edited or altered in any way without his express consent. He referred to this alteration of his film as a "matter of conscience" and "a matter of responsibility".

> "Certainly a film, and the audience's relationship to the film, is a consciously designed train of thought. I am concerned with my responsibility to my work and to the individual's right, as an audience, to be treated as a thinking, responsive mind and not just as a device to be moved by the extraordinary skillful figures in the commercials. Insertion of some thirty-five skillfully conceived commercial "skits" into my film, A Place In The Sun, leaves the film hopelessly disjointed, leading to a complete dislocation of the film from its purpose -- its purpose being to have an association with its audience and a continuity from beginning to end. The film becomes just a device

> thrown in to attempt to hold their interest. We hope that through this [lawsuit] and other efforts of its kind we can do something to let there remain a conscience at work in film and a responsibility to the audience. And from where I sit and what I see, I don't think the great television broadcasting people acknowledge that or care about it."

That was a plea from a man who devoted his life to making films and providing enlightenment and entertainment of quality and moral value to the American people. So I raise his voice once again today, in concert with my own, to urge that we as a proud nation begin a process to safeguard our great motion pictures and to protect the interests of the American people.

The words of President Kennedy that are carved into the walls of our national cultural center express our responsibility with eloquence:

> "I look forward to an America which will not be afraid of grace and beauty. I look forward to an America which commands respect throughout the world not only for its strength, but for its civilization as well. And I am certain that after the dust of the centuries has passed over our cities, we, too, will be remembered not for victories or defeats in battle or in politics, but for our contribution to the human spirit."

Let us find the means to safeguard our contributions to the human spirit.

Senator DECONCINI. Thank you, Mr. Stevens, very much.
Mr. Gumpel.

STATEMENT OF GLENN GUMPEL, NATIONAL EXECUTIVE DIRECTOR, DIRECTORS GUILD OF AMERICA

Mr. GUMPEL. Mr. Chairman, members of the committee, there is no question that the implementation of explicit Federal moral rights in the United States would mark a sharp departure from current legal norms. So you, the Members of Congress, the Copyright Office, and some on the other side of this issue have all asked whether the Directors Guild and the motion picture producers could resolve these questions in the familiar forum of private negotiations—sidestepping, naturally, the need for congressional action.

The short answer is that we could not. At the heart of the issue is the structure of American labor law. It is totally erroneous to assert that the producers are compelled by American labor law to negotiate over subjects such as moral rights where those rights involve the right to control the use of the film after the cessation of employment. Employers are compelled to bargain only over mandatory subjects of bargaining, and these are defined by statutes as wages, hours of employment, and other terms and conditions of employment. Other conditions sought by labor organizations are either permissive or illegal subjects of bargaining. For a labor organization to bargain to impasse or strike over a permissive subject is to violate Federal labor laws.

Regrettably, the rights at issue today are most likely permissive subjects. As the law stands, producers cannot be compelled to bargain over moral rights. However, even if they would agree, there are problems. It ought to be pointed out that the Directors Guild has never represented all American directors, or had contracts with all American producers. I think you heard someone testify this morning that their statistics indicate about 95 percent of the films are done by Directors Guild members. Our statistics show that closer to 80 percent of the films that are released theatrically are represented by Directors Guild members, although a minority of films have been made throughout the guild's history that are not covered by Directors Guild agreements.

If we could accomplish moral rights at the bargaining table, a two-tiered system of rights and nonrights would emerge. There are societal interests in developing and protecting artists' rights. It is obvious from the lack of uniform collective bargaining coverage for directors that deferral to collective bargaining will not accomplish these societal rights.

Take a moment to develop this line of reasoning further. Are we to suppose that moral rights should be transitory? Even if the producers agree to discuss these matters, collective-bargaining agreements are normally renegotiated every 3 years or so. Those who held interests or rights in films would be subject to deviations of the rights established in the previous round of negotiation. The enormous uncertainty created by the continual collective bargaining of authors' rights, as opposed to Congressional enactment, would be against the interests of both authors and producers.

You have also heard this morning—or a question arose—with regard to individual rights. Can directors go and negotiate on their own outside the guild? Well, I am the executive director of the guild; we represent 9,000 people, and I continually review individual contracts of directors with studios outside of our guild agreement. At my guess there is a handful—I mean, one handful—of directors who have the clout to negotiate those moral rights that we're speaking about today.

If Congress approves the Kennedy bill and provides moral rights to painters and sculptors, Congress would not be acting with the expectation that every few years it would review the matter. The essence of collective bargaining is to provide a framework for dealing with the ever-changing needs of the workplace. The right to protect American films should not be subject to or compared with the kinds of matters typically resolved in the give-and-take of the bargaining process.

I ask, should those who have the biggest stick in the next fight determine the future of America's film heritage? We think not. If it is right to establish moral rights, and we believe it is, then it is not a right that ought to be subject to economic might and power or the willingness of any party to come to the bargaining table.

[The prepared statement of Mr. Gumpel follows:]

DIRECTORS GUILD OF AMERICA

STATEMENT OF GLENN GUMPEL

BEFORE THE

SUBCOMMITTEE ON COPYRIGHTS, TRADEMARKS, PATENTS

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

OCTOBER 24, 1989

My name is Glenn Gumpel and I am Executive Director of the Directors Guild of America. In my capacity as Executive Director, I am responsible on behalf of the 9,000 members of the Guild for all of the Guild's negotiations and collective bargaining agreements. I have previously held positions with MCA as a Vice-President of Employee Relations and Business Affairs, and with ABC as a Supervisor of Affiliate Relations.

I am very pleased to appear before the Committee this morning, essentially to clarify a matter that has been raised in the past 18 months as the debate on moral rights has developed and intensified: Is it appropriate that moral rights for film authors be deferred to the collective bargaining process?

But let me preface my remarks by simply stating that the Directors Guild is pursuing the matter of moral rights solely to gain protection for the film arts and for the country's motion picture heritage. There is a sharp disagreement on moral rights between the partners to motion picture making, the financiers and the creative elements. We wish only to honor film, only this,

and we have made it clear repeatedly that Congress should develop moral rights legislation in such a way that no economic benefit would accrue to directors. No, our deep conviction, shared by all of the creative guilds, is that the defacement of motion pictures is wrong, and contrary to the interests of society. Real redress for this grievance lies within the purview of this Committee and within the copyright laws.

There is no question that the implementation of explicit federal moral rights in the United States would mark a sharp departure from current legal norms. So, Members of Congress, the Copyright Office, in its report this spring, and some on the other side of this issue, have all asked whether the Directors Guild and the motion picture producers could resolve these questions in the familiar forum of private negotiations, sidestepping the need for Congressional action.

The short answer is that legally we could not.

At the heart of the issue is the structure of American labor law. It is totally erroneous to assert that the producers are compelled by American labor law to negotiate over subjects such as moral rights where those rights involve the right to control the use of a film after the cessation of employment. Employers are compelled to bargain only over mandatory subjects of bargaining. These are defined by statute as rates of pay, wages, hours of employment and other terms and conditions of employment. Other conditions sought by labor organizations are

either permissive or illegal subjects of bargaining. For a labor organization to bargain to impasse or strike over a permissive subject is to violate Federal labor law. Regrettably, the rights at issue today are permissive subjects. As the law stands, employers cannot be compelled to bargain over moral rights.

Even if they would agree, there are problems.

It is true that the Directors Guild has a collective bargaining relationship with the Alliance of Motion Picture and Television Producers (AAMPTP). This relationship has been a sound and productive one. It is unquestioned that American directors through the Guild have enjoyed a fifty-year partnership in collective bargaining in developing the American film industry to its current status as the unparalleled leader in the world. We have every expectation that this will continue to be the case.

However, it ought to be pointed out that the Directors Guild has never represented all American directors or had contracts with all American producers. Though a minority, films have been made throughout the Guild's history that are not covered by Directors Guild agreements. If you could accomplish moral rights at the bargaining table, a two-tiered system of rights and non-right would emerge. We believe that there are societal interests in developing and protecting artists rights. It is obvious from the lack of uniform collective bargaining coverage for directors that deferral to collective bargaining will not accomplish these objectives.

To develop this line of reasoning further, are we to suppose that moral rights should be transitory? Even if the producers agreed to discuss these matters, every three years those who held interests or rights in films would be subject to deviations of the rights established in the previous round of negotiations. The uncertainty created by the continual collective bargaining of authors' rights, as opposed to Congressional enactment, would be against the interests of both authors and producers by creating enormous uncertainty.

If Congress approves the Kennedy bill, and provides moral rights to painters and sculptors, Congress would not be acting with the expectation that every few years it would review the matter. No, new statutory rights would be granted to serve a matter of societal interest in which there is no foreseeable end point. The essence of collective bargaining is to provide a framework for dealing with the ever changing needs of the workplace. The right to protect American films should not be subject to or compared with the kinds of matters typically resolved in the give and take of the collective bargaining process. Should who has the biggest stick in the next fight determine the future of America's film heritage. We think not. If it is right to establish moral rights, and we believe it is, then it is not a right that ought to be subject to economic might and power, or the willingness of any party to come to the bargaining table.

Clearly, by law, moral rights cannot be achieved at the bargaining table. And, in any case, rights achieved at the bargaining table are limited to those party to the negotiation and are binding only from one round of negotiation to the next.

Discussion of collective bargaining in connection with moral rights tends to obscure a clear imperative, that artists and their work are entitled to a greater level of protection. We are pleased that some momentum seems to be developing in Congress to expand artists rights, even as evidenced by this set of hearings. We believe Congress should act, and that it needs to do so expeditiously. The country that gave motion pictures to the world should not be negligent, particularly in comparison to other countries, in recognizing film as an artistic enterprise worthy of protection.

Senator DECONCINI. Thank you, Mr. Gumpel.

I have a lot of questions. It is a very interesting presentation here. First let me address Mr. Forman.

Mr. Forman, I saw your film, "Hair," the original presentation. From what you say, you didn't like what they did to it, but it would not have been shown to literally millions of Americans under the Federal Communications restrictions had it not been altered.

Is your point that you wanted to be able to make that decision? Or are you satisfied that you would not have approved it based on how much was extracted or taken out of it?

Mr. FORMAN. The same film was sold to American Network, which has the same standards of censorship as a syndicate. But because my contract protected me when the sale came to the network, they knew that they had to seek my approval. They did the same job, but with such care and intelligence that I happily approved the viewing. It was only that I was not protected, and I was not protected—in the case of the sale to the syndicated stations, they did just whatever they thought. He was paid the same amount of money, the guy—I think it was Frank Cablonz, who was the president of MGM then—"go and give them 90 minutes of film."

Senator DECONCINI. But could that not have protected you in your original contract?

Mr. FORMAN. I obviously was not protected and I did not have the power to be protected. Without it, my lawyer, who belongs to one of the most prestigious and respected law firms in Los Ange-

les—the answer was "Sorry, Milos, there is nothing in American law that we can do about it."

Senator DECONCINI. But the original contract, you could have put that protection in, could you not?

Mr. FORMAN. Well, I might have reasoned that they would say no. Is this the breaking point for the contract? OK, let's get another director.

Senator DECONCINI. Mr. Stevens, you point out the extremes of Jimmy Stewart and Ted Turner. I have trouble in agreeing with either one of those in absolute terms, recognizing the entrepreneurship in the business and the market and what have you, and also the tremendous talent of Jimmy Stewart and those who feel that way. And then I think you said there is some middle ground, something you can do here. What is it?

Mr. STEVENS. I do not have the answer, but I think——

Senator DECONCINI. I don't, either.

Mr. STEVENS [continuing]. The question right now is, do we ignore the problem or do we move and seek a legislative solution? And I would think that by the process of legislation, as you have solved or worked toward solving the problems of clean air and saving the parklands, that we could find a way to save what is such a distinct part of our cultural heritage.

Senator DECONCINI. It is a distinct part, and it is something I would like to grab onto. One of the problems—when you say economics, you have something that is working so well for the benefit of the public viewing audience. They may not realize what they are missing, and they may really be missing something of great value there. On the other hand you have this great ar istic value that you don't want to just run over and just say, "Well, money is more important than this." I find myself in a great dilemma.

But let me ask you, Mr. Gumpel, if your Directors Guild represents between 80 and 95 percent of directors—say 81 percent for purposes of argument—why don't you use that in all your contracts for the 80 percent you do represent, saying, "This is what we want; we're not going to sign any contracts; we're not going to do business"? If you've got that much clout with 80 percent of them, wouldn't that bring the industry to you on this issue where you could negotiate? Or have you tried that?

Mr. GUMPEL. No, we couldn't, because as I said in my remarks that's just not a mandatory subject of bargaining. We would say we're not going to do it, we're not going to agree. Our only alternative, therefore, is to go out on strike. That's an illegal strike. We would be in Federal Court downtown here in 2 minutes.

Senator DECONCINI. You mean that they could make you work?

Mr. GUMPEL. That strike would be illegal, right.

Senator DECONCINI. They could force you to do the direction because you failed to agree to something?

Mr. GUMPEL. At least from a guild point of view, we could not have a strike. I guess individuals out there, doing something outside the Directors Guild——

Senator DECONCINI. Well, if you could not have a strike you could not produce, right? I mean, you couldn't do a formal strike but you could refuse to work. They can't make you work?

Mr. GUMPEL. I think we would be violating some laws.

Senator DECONCINI. Well, you don't have to sign the agreement, right? They can't make you sign the agreement. If you enter into an agreement and your 80 percent of directors say, "We're just not going to sign any agreements that don't give us this right, even though it's not mandatory"——

Mr. GUMPEL. We would be ordered by the court to order our members back to work, sir.

Senator DECONCINI. You would?

Mr. GUMPEL. Yes, sir.

Senator DECONCINI. And your members then would have to work against their will, in your interpretation of the labor laws? I don't think that's correct.

Mr. GUMPEL. I'd like to do some research——

Senator DECONCINI. I don't think that's correct, but I don't know.

Mr. GUMPEL. As individuals, obviously, they are not forced to work. But from a guild perspective we would have to order our people back. I would have to stand up there and do that. I can't make Milos Forman walk to Universal Studios, but I, as the guild representative, would have to tell him under the collective-bargaining agreement, under the laws of this country, that we cannot have a strike. What he does on his own is on his own.

Senator DECONCINI. OK. So you tell him, "You've got to go back because it's not mandatory," and you also tell them, "Hey, folks, you do what you want to do. You know the problem here. We can't get the Congress to pass the law. We ought to defend ourselves. We ought to protect our rights," what have you. What do you think your members would do, do you have any idea? Have you ever asked them?

Mr. GUMPEL. Well, we've never asked them outright, but I would think that those who are economically strong and the handful that don't need to work might not work. But we represent an awful lot of directors who need to work, who need to work today and tomorrow.

Senator DECONCINI. In your opinion, would the majority probably go back?

Mr. GUMPEL. Absolutely.

Senator DECONCINI. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

Gentlemen, it is good to see you here. Mr. Forman, you testified at a hearing I held earlier and I appreciate seeing you back here.

Mr. Stevens, we've known each other for a long time. I'm glad to see you here.

Mr. Gumpel, on the last issue, in answer to Senator DeConcini's question, I hope you will look at that carefully. You may want to provide something further for the record. Neither of us want you to give a "horseback legal opinion" on what is obviously a difficult thing, but what if, after an accident of some sort in producing a movie, all directors said, "We're not going to film if they use the XYZ type of machine because we think it's inherently dangerous," or, "We don't want to direct on a set that has asbestos in it, and none of us are going to do it. The contract does not specify that we have to be protected from asbestos, but we're just not going to do it." I would think that they would be able to do that.

Take a look at the particular question and if you have some further ideas or want to restate the question yourself and send it to us, feel free.

Let me ask this question. I understand that Turner, which has been doing much of the colorization, has now labeled all its colorized films, and they say something to the effect that "This was colorized without the permission of the original director," something similar, I believe, Mr. Stevens, to what the National Film Preservation Board has talked about.

Does that satisfy any or all of the concerns that you have raised? I might start with you first, Mr. Stevens, and then Mr. Forman, and then Mr. Gumpel.

Mr. STEVENS. None. I think that "A Place in the Sun," to take that example—remember, Senator, Montgomery Clift and Elizabeth Taylor, and the idea of Montgomery Clift waiting in his cell and Elizabeth Taylor comes to him before he walks down the corridor to his fate—was designed, was lit, it had a mood, it had an artistic quality that had to do with black and white. I think it's a desecration for that film to be altered and my father's reputation, I think, is damaged if Mr. Turner chooses to do that.

Senator DECONCINI. Would the Senator yield?

What if you or your father said that it was okay to colorize it? You're saying now that you know that they would never have done that. Do you know that for a fact, that he would never have agreed to that?

Mr. STEVENS. I do so, yes.

Senator DECONCINI. Because to me that is another issue here, that if an artist is so adamant then we're really not talking about collective bargaining either. If you're talking about George Stevens, Sr., no matter what, he would never agree to any colorization of any of his films, then you're really not talking about collective bargaining. You're talking about an absolute, is what you're doing. When you're talking about collective bargaining, as I see it, you're talking about people willing to compromise. And maybe when you are an artist you cannot compromise. You are there; you just cannot compromise, particularly if you have the law on your side that says you don't have to.

Mr. STEVENS. I would say that what made the films of George Stevens and John Ford and the other great American directors—Orson Welles, William Wyler, Frank Capra—if you went around and asked people conversant with filmmaking what single quality made those men's films great, it would be "uncompromising."

Senator DECONCINI. Thank you. I appreciate the Senator yielding.

Mr. STEVENS. And I am disappointed, Senator—and I recognize the distinction—we're talking about retrospective production of the film heritage, which is somehow a different issue, I think, than the films that are now being negotiated, when people are aware of what might later be done to them.

Senator LEAHY. In an aside, I remember some of the black-and-white newsreel footages of World War II. Ironically, a lot of those films were shot in color and then reproduced in black and white like they did in Movietone News. Some were shot in color, amazingly enough, with very slow color film of 10 ASA, 20 ASA, some-

thing like that, and it created quite a stir when some of them were finally brought out of the archives and people saw them in color, which I guess was a form of Kodachrome or something from that time.

But when Mr. Stevens says that individuals often have artistic reasons for photographing something in black and white, he is not talking about just photographing for a newsreel-type thing. Rarely is it that something that is shot and intended just for black and white comes across well in color, particularly if it's designed to use shadows and lights and the various shades of black and white. The example we used here was one of Ansel Adams' well-known photographs. Colorized, it's not the same thing. By the same token, there are certain extraordinary color films in which the use of color is such an integral part, that it wouldn't work in black and white. When you look at some of the black-and-white photographs of some of these films that appear in newspapers or ads, there's just no comparison.

I pose the same question to you, Mr. Forman, does the labeling of colorized films satisfy any of your problems?

Mr. FORMAN. As a temporary step, yes, but not as a final solution. Nothing should be altered without the permission of the artistic authors. No alteration should be permitted without consent.

Senator LEAHY. Mr. Gumpel?

Mr. GUMPEL. I obviously second Mr. Forman.

Senator LEAHY. Mr. Chairman, I have had an electronic reminder five times now, reminding me that I am supposed to be at another hearing. I mention that only so that the other panel does not take umbrage at it. I will leave Jeff Nuechterlein, a key staff member of mine, here to listen to that testimony. We will review it and we will have questions for the record.

Thank you.

[Questions asked by Senators, and the answers thereto, subsequently submitted by panel members, follow:]

Milos Forman
150 Central Park South
New York, NY 10019

November 27th, 1989

Senator Dennis DeConcini
Chairman
Subcommittee on Patents
Copyrights and Trademarks
United States Senate
Washington, DC 20510-6275

Dear Senator DeConcini:

Thank you for your letter dated November 9th, 1989 requesting additional information following my testimony at your Subcommittee on October 24th, 1989.

I have taken the liberty to comment only on questions that I feel competent to answer. My answers are divided into the same headings and numbering as the enclosure to your letter.

I thank you for holding those hearings and remain at your disposal to comment on any aspect that you or members of your Subcommittee may wish to raise on the issue of moral rights which is so important to me and my colleagues.

Sincerely,

Milos Forman

Enclosure

QUESTIONS BY SENATOR CHARLES E. GRASSLEY

QUESTIONS FOR DIRECTORS GUILD:

1) Without diminishing the least the contribution of the other artists, it is my opinion that the principal authors of a motion picture are its director and the principal screenwriter. These two artists originate and conceive the ideas and the vision of the entire motion picutre. Consequently the everyday execution of this vision as well as those ideas is conducted authoritatively throughout the whole preparation, production and postproduction of a motion picture by the film director.

I elaborated on this subject more extensively in my testimony before the Senate Subcommittee and I would appreciate if you could refer to this testimony when you consider these issues in the months ahead.

2&3) In my opinion and with my respect for fairness, this protection should be extended to all motion pictures.

4) I am sorry that I do not clearly understand Senator Grassley's question, in particular what he means by "intellectual" as opposed to "creative" forms.

5) I don't really feel expert enough to answer this question with authority but it seems to me that there is a very distinctive difference between two groups of art forms. Literature, films, music, theatre and fine arts (painting, sculpture, etc.) are predominantly here to satisfy a human craving for emotions, enlightment and entertainment,

while architecture, fashion designing etc. are here to serve predominantly our everyday life's requirements.

The very different functions of these two groups of art forms should determine also a different approach towards the moral protection of the authors in these two groups.

QUESTIONS FOR PANEL 2

HEARING ON PERFORMING ARTS MORAL RIGHTS

OCTOBER 24, 1989

1) Collective bargaining as we know it in the US doesn't exist in Europe. But the basics are the same: the whole entertainment industry in Europe is market oriented. Also in Europe the directors very often have a stake in their films. It is not an exception that they own partly the negative of their films and therefore control or even execute themselves any changes and alterations required by exhibitors in different medias.

2) I do not feel expert enough to comment on this subject.

3) I do not feel expert enough to comment on this subject.

4) The Berne Treaty is a very carefully balanced treaty. On one hand it protects the revenues of the copyright owners, while on the other hand it is protecting the moral rights of the authors. And it is somehow disquietening in my mind if we join the Berne Treaty only to claim the benefits without accepting the responsabilities.

5) The time spent on arguing why the adoption of moral rights won't do any great harm serves one purpose only: to alleviate and hopefully dispel fears of copyright owners. We need them to believe that we sincerely seek the same objective as they do: we all want our films to be seen by as many people around the world as possible and we will do everything to reach this goal. We just want that all that has to be done be done the right way.

That is why we so adamantly advocate the changes in the law. Without the artist's participation the altering of our films too often results in mutilation, disfiguration and even travesty of our work.

I find it ironical that the only audience in the civilized world which will rarely see American films the way they were created, is the American people at home in front of their TV sets.

6) As a half measure, this is a step in the right direction. I would certainly prefer that instead of removing the name, a credit would be inserted before the film, during every commercial interruption and at the end saying:

"This motion picture was altered (through editing or colorizing or panning, whatever the case) for television without the author's supervision and thus is not identical to the original."

This solution would be more honest because it would give the public the truthful information.

7) The colorizing, scanning and panning, though altering the visual perception of a film, are not really altering the content of the film, its story and characters. The most cruel damage to the film is done by unauthorized editing. Such altering <u>is</u> changing the content of the film, its meaning, its pace, the credibility of the story and its characters.

By refusing to protect the creator's right to supervise such editing the Congress is in fact <u>indirectly</u> harming the content of the film.

8) Simply because every American film is a part of a very unique phenomenon of American cultural heritage, while pipes in the wall or a dry-cleaned sweater are not. If one day your plumber can't come, you call another one to do the job; if your drycleaners are closed this week you go to the next nearby, but if Steinbeck didn't write "of Mice and Man" or Orson Welles didn't make "Citizen Kane", we would not have them. They would not exist! Our cultural heritage would be so much poorer and our pride smaller.

9) I am convinced that the "Serafino" decision in Rome will not do any visible harm to the Italian film industry. Yes, incidents like this will inevitably occur from time to time but I assure you that the overwhelming majority of film-makers is in favour of accomodating the requirements for different medias. We simply want these changes to be done right and with utmost responsability.

10) In my opinion, additional moral rights protection would definitely encourage the striving for excellence. When you know that you alone will be forever called responsible for the quality of your work, you try harder.

11) Because the problem is so basic and its importance so timeless that it shouldn't be subjected every three years to bargaining.

Besides, the DGA doesn't represent all American directors and we consider <u>all</u> American films to be part of our cultural heritage.

12) I think the answer to the question no. 6 can be applied here.

13) My reaction to this question is explained in answer no. 1 to Senator Grassley's questions.

14) In my understanding we are not asking you to judge our work but to protect it against uncontrolled and indiscriminant changes by those who have nothing to do with the authorship of the film and yet are, in fact, behaving as if they were authors themselves.

15) Whether a director wants to become also a producer or co-producer of the motion picture should remain an individual decision of every director.
I, personally, was offered several times to participate in the production of my films as a producer or co-producer. Although it would be fi nancially beneficial for me, I always declined because I want to devote 100% of my time, concentration and energy solely to the creative aspects of filmmaking. I feel it necessary if I want to function at my best as a film director.

16) To the question asked at the last Senate hearing by Senator De Concini "why the exhibitors find it difficult to accept the authors' right to approve any changes performed on their films", the representant of the broadcasters replied briefly: "It is time-consuming". Yes, it is time-consuming. But quality is always time-consuming. And I believe that American audiences deserve quality.

Directors Guild of America, Inc.

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REPLY TO

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General Counsel
ELLIOTT WILLIAMS

December 7, 1989

TO: LARRY CHERNIKOFF

FROM: GLENN J. GUMPEL

RE: QUESTIONS BY SENATORS GRASSLEY, LEAHY AND DECONCINI BASED ON HEARINGS OF OCTOBER 24, 1989.

SENATOR GRASSLEY'S QUESTIONS:

Q: IT IS MY UNDERSTANDING THAT THE DIRECTORS GUILD SUPPORTS MORAL RIGHTS LEGISLATION THAT WOULD CREATE RIGHTS ONLY FOR DIRECTORS. ISN'T THIS INCONSISTENT WITH THE CONCEPT OF MORAL RIGHTS IN THAT ALL CREATORS CAN SELL THEIR ECONOMIC RIGHTS BUT NOT THEIR MORAL RIGHTS OF PATERNITY AND INTEGRITY?

1. With respect, your understanding is incorrect. The Directors Guild supports broad Moral Rights legislation that would protect a whole range of artistic disciplines. Further, we support Moral Rights legislation for directors and screenwriters who are the "authors" of motion pictures. (In the New College Edition, The American Heritage Dictionary, the definition of the word author is: "Middle English 'autour' from old French 'autor', from Latin 'auctor', creator, from 'augere' (past particle auctus), to create, increase.").

Moral Rights are a human right (please refer to Article 27 of the Universal Declaration of Human Rights which the U.S. affirmed on December 10, 1948 as part of a unanimous vote of the United Nations. It has been reaffirmed a number of times by presidential proclamation). Moral Rights is a reflection of the "personness" of the artist.

Q: WOULD ALL DIRECTORS BE ENTITLED TO THIS PROTECTION, OR WOULD ONLY CERTAIN MOVIES BE ENTITLED TO PROTECTION?

2. All film directors and screenwriters would be entitled to Moral Rights protection.

Time will show that some artists are great, and some are not. Moral Rights do not distinguish between them; they are not applied qualitatively. However, just as archeologists tell much from the temples and garbage piles of civilizations past, our descendants will define our society, by virtue of, among other things, the art, great and minor, that attracted us, "that which sold and that which did not sell". Much junk will have attracted audiences and much that is elegant and fine will have been rejected. That process is a definition of a society as much as the reverse. At this point in time there is no way to tell how the future will judge the artistic products of the present. History is filled with examples of artistic endeavor, considered in their time to be "offensive or worthless", later evaluated as "great".

Q: IF ONLY CERTAIN MOVIES WOULD BE ACCORDED PROTECTION HOW WOULD IT BE DETERMINED WHAT MOVIES WILL BE PROTECTED?

3. All artists should receive protection. Congress is not asked to legislate Moral Rights for some directors and writers and not others.

Q: IF "MORAL RIGHTS" ARE PLAYED OUT CONSISTENTLY, SHOULDN'T ALL ART FORMS BE RECOGNIZED, INCLUDING CREATIVE FORMS AS WELL AS INTELLECTUAL FORMS?

4. What is the difference between "creative forms as well as intellectual forms?"

If the question refers to disciplines which are based on aesthetic principles as different from those which are not (instructional books, legal treatises, journalism, etc.), the answer is quite simple; our petition is concerned only with the former and it is concerned with filmmaking only. Filmmaking is only one aesthetic discipline among many art forms, with which we are generally concerned and is the only one about which we are competent to comment in this venue.

Q: IF ARCHITECTURE IS ART, HOW WOULD MORAL RIGHTS APPLY TO ARCHITECTS WHO DRAW PLANS AND SELL THEM TO DEVELOPERS? WOULD ENGINEERS BE FREE TO MODIFY PLANS IN ORDER TO MAKE BUILDINGS STRUCTURALLY SOUND? WOULD CHANGES BE PERMITTED TO SUIT THE BUYER'S TASTE? ONCE A HOME IS SOLD, WOULD ANY ALTERATION, RENOVATION, OR AESTHETIC CHANGES TO THE HOME CALL INTO ISSUE THE ARCHITECT'S MORAL RIGHTS TO INTEGRITY?

WHAT ABOUT CLOTHING DESIGNERS? UNDER THE MORAL RIGHTS RUBRIC, WOULDN'T IT BE A VIOLATION OF A DESIGNER'S MORAL RIGHTS TO ALTER, OR IN ANY WAY RE-FASHION A PARTICULAR ITEM OF CLOTHING ONCE BOUGHT?

5. Although all artistic disciplines fulfill a general societal role endorsed by civilized nations, each draws from the society specific materials and requires specific and different means for the presentation of the finished work. Thus society is presented with different problems as the art works are presented to it for public display or use (libraries, museums, theaters, etc.).

Architecture, because it is an art, is included among those artistic disciplines for which the Berne Treaty requires Moral Rights protection. However, its requirements are dramatically different from those of films, for instance. There are public safety ramifications in the erection, use and aging of buildings. No such problem is presented by films. Zoning restrictions are common as society responds to land use concepts. No such problem is presented by films. There is only so much space on the planet. Any general prohibition against replacement of buildings would lead to an absurd situation where land once used for building construction would forever be denied to society for other uses. No such problem is presented by films.

It should be noted that the petitioners for redress in this matter are primarily filmmakers. To our knowledge, no architect has felt so wronged that he or she has sought redress in Congress. Congress therefore, is under no compulsion to deal with any specific offenses against the Moral Rights of architects until they are defined by the community of architects. The Directors Guild

is competent to speak to Congress only about the area of its expertise; others will be competent to bring to the attention of Congress any perceived wrongs they may suffer. Congress may then deal with the specific problems and advantages for society presented by other disciplines.

With regard to the question about clothing designers, when clothing designers complain, Congress may deal with their problems. Meanwhile, if it is of help, we can obtain a description of how French law, for instance, treats this matter.

SENATOR LEAHY'S QUESTION:

Q: ON PAGE 70 OF ITS REPORT ENTITLED "TECHNOLOGICAL ALTERATION TO MOTION PICTURES," THE REGISTER OF COPYRIGHTS STATES: "IF ONE CANNOT BARGAIN FOR THE DESIRED RIGHTS, THE OPTION STILL EXISTS FOR THE DIRECTOR TO SEEK INDEPENDENT FINANCING OF HIS OR HER FILM, A TASK WHICH MAY BE DIFFICULT, BUT WHICH IS CERTAINLY NOT IMPOSSIBLE. FOR EUROPEAN DIRECTORS, THAT PRACTICE IS STANDARD." IS THIS A VIABLE OPTION FOR AMERICAN DIRECTORS WHO WANT TO RETAIN CERTAIN "MORAL RIGHTS" IN THEIR FILMS?

If "Moral Rights" are a "human right" as recognized by the U.S. when we affirmed the Universal Declaration on Human Rights in the United Nations on December 10, 1948, as part of a unanimous vote, then they exist not only for those who finance their own films (provided that they direct or write them) but also for those whose films are financed by others.

A question such as this flows directly from the blurring of a distinction between "owner and author" which has been allowed to creep in to American law. The Gephardt Bill, HR2400, recognized the difference and drew a neat distinction between economic authors and artistic authors. The former were the copyright owners for economic and distribution purposes, and the latter were the authors (the creators) for purposes of Moral Rights.

Under current American law we are now faced with the following absurd situation: a Japanese corporation (Sony) is now the author of the BRIDGE ON THE RIVER KWAI, THE BATTLE OF THE CORAL SEA,

KING RAT, FROM HERE TO ETERNITY and THE LAST EMPEROR. Sony can release these films so cut or changed that their meaning, cultural and historical impact is completely reversed thereby offending both the moral and patriotic rights of the true creators of the film. This is to say nothing of Sony's absolute right under current law to destroy the negatives in order to deny the future any opportunity to view the films. The Senator should know that the Japanese excised, from the exhibition of THE LAST EMPEROR, in Japan, all footage relating to the rape of Nanking. This was clearly an attempt to distort history. One can only wonder what will happen to THE BATTLE OF THE CORAL SEA or THE BRIDGE ON THE RIVER KWAI if, indeed, they are ever seen again.

The definition of "author" lies at the heart of most of the difficulties faced in the debate over this issue.

SENATOR DECONCINI'S QUESTIONS

Q: WHAT IS THE STATUS OF COLLECTIVE BARGAINING BETWEEN MOTION PICTURE PRODUCERS AND BOTH DIRECTORS AND SCREENWRITERS, AS WELL AS OTHERS LIKE CINEMATOGRAPHERS, IN EUROPE. COULD YOU DISCUSS THE RELATIONSHIP BETWEEN THE COPYRIGHT MORAL RIGHTS THESE ARTISTS ENJOY IN EUROPE AND THEIR ABILITY TO BARGAIN COLLECTIVELY?

1. Please see the reply of Milos Forman.

Q: WHY SHOULD CONGRESS SINGLE OUT ONE AREA OF POSSIBLE COLLECTIVE BARGAINING FOR LEGISLATING. ARE THERE PROVISIONS OF COLLECTIVE BARGAINING AGREEMENTS THAT YOU WOULD BE WILLING TO GIVE UP IN EXCHANGE FOR MORAL RIGHTS? HAVE YOU MADE THAT OFFER? WHAT WAS THE PRODUCERS RESPONSE?

2. Congress should not involve itself in the collective bargaining process.

One cannot exchange an economic or material right for a human right. That way lies a socialist state. Moral Rights exist independent of any bargain. They are indigenous to the human being.

It should be clear that Moral Rights in the United States would be applied to non-American citizens whose works are exhibited in the U.S. The Directors Guild does not bargain for them nor

for American directors who are not members of the Directors Guild.

Most important, the question presumes that moral rights are an appropriate and required subject of collective bargaining. Statutory subjects such as moral rights, by definition, are not mandatory or required subjects of collective bargaining. Mandatory subjects, both by custom and statute, involve themselves with the employment relationship. Moral rights are rights that do not relate to conditions of employment. They come into play outside and after the cessation of the employment relationship.

Q: WOULD YOU BE WILLING TO GIVE UP YOUR RIGHTS TO COLLECTIVE BARGAINING IN EXCHANGE FOR MORAL RIGHTS? IF CONGRESS IS GOING TO START MANDATING THE RELATIONSHIP BETWEEN PRODUCERS AND ARTISTS, WHY SHOULDN'T WE GO ALL THE WAY AND SAY THAT SUCH PROVISIONS CONSTITUTE THE ENTIRE LEGAL RELATIONSHIP?

3. The simple answer is "no." Why should artists be required to forego rights relating to the protection of their films after their employment relationship ceases. The question again presumes that moral rights are an appropriate subject of bargaining. See also answer to number 2.

Q: I AM CURIOUS AS TO WHY THIS ARGUMENT THAT OUR DISCUSSION HERE IS EITHER A CONTINUATION OF, OR SOMEHOW MANDATED BY, THE BERNE CONVENTION. AS THE REGISTER SAYS IN HIS STATEMENT, "ADDITIONAL MORAL RIGHTS PROTECTION MUST BE JUSTIFIED ON ITS OWN MERITS RATHER THAN ON COMPLAINTS ABOUT 'NONCOMPLIANCE' BY THE UNITED STATES WITH ARTICLE 6BIS OF THE BERNE CONVENTION." IT SEEMS TO ME THAT IT IS NOT PRODUCTIVE FOR US TO SPEND OUR TIME DISCUSSING WHETHER OR NOT CONGRESS WAS INTELLECTUALLY HONEST IN ADOPTING THE BERNE CONVENTION IMPLEMENTING LEGISLATION. I WILL SAY THAT I AM NOT PERSUADED BY THE ARGUMENT THAT I MUST DO SOMETHING NOW, BECAUSE I WAS DISHONEST IN NOT DOING IT BEFORE. I HAVE NEVER FOUND INSULTS TO BE PERSUASIVE. DON'T YOU AGREE THAT IT IS BETTER FOR US TO FOCUS ON THE APPROPRIATENESS OF MORAL RIGHTS, THEIR SCOPE, THE BENEFICIARIES, THEIR ADMINISTRATION AND REMEDIES, AND OTHER ISSUES?

4. With all respect to the Register of Copyrights, we agree that Moral Rights should be justified on their own merits but disagree that, having signed an international treaty requiring that they exist, we should be silent when we find that they do not. There is no lawyer or legislator who can tell us which American law would apply Moral Rights to American directors and screenwriters.

If the Senator says that he is "not persuaded by the argument that" he "must do something now because" he "was dishonest in not doing it before" he denies the purposes of corrective action to repair historical errors. Congress recently rescinded legislation that it had passed only a short time before in the matter of medical care for the aged. Most legislation is remedial

and is intended to rebalance interests, even competition, and ultimately, to right wrongs. We hope that the Congress will take a new look at its action with regard to the Berne Treaty because we believe that it acted half-heartedly in passing Berne.

With regard to any implied insults, certainly the Senator knows that none was intended. None should be drawn from the fact that we strongly but respectfully disagree as to whether, in the case of the Berne Treaty, there is now full Moral Rights protection in U.S. law. The admission that Congress took a "minimalist" approach certainly supports our contention that a wholehearted, open and forthright adherence to Article 6bis of the Berne Treaty was not and is not intended by U.S. action in signing the Treaty. In this case, silence is not golden; disagreement is the fuel of a truly democratic debate.

Q: IN THE DEBATE ON MORAL RIGHTS, I FIND MUCH OF THE ARGUMENT IS SPENT ON WHY THE ADOPTION OF MORAL RIGHTS WON'T DO ANY GREAT HARM. LESS TIME IS SPENT ON WHY THEY SHOULD BE ENACTED. I BELIEVE THAT IT IS THE BURDEN OF THE PARTY ADVOCATING A CHANGE IN LAW TO PROVE THAT SUCH CHANGE IS NECESSARY, APPROPRIATE AND WILL NOT DO MORE HARM THAN GOOD. I UNDERSTAND YOUR ARGUMENT AS TO THE LATTER, BUT I AM STILL NOT SURE WHY YOU THINK CONGRESS SHOULD MAKE THIS CHANGE IN THE COPYRIGHT LAW. CAN YOU TELL ME BRIEFLY AND SUCCINTLY, WITHOUT EXAGERRATION AND RHETORICAL EXCESS, WHY CONGRESS SHOULD ENACT MORAL RIGHTS.

5. Congress should adopt Moral Rights because it has stated to the Berne Convention that it has already done so. In addition, in 1948 the U.S. affirmed the International Declaration of Human Rights which, in Article 27 states that, "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

The Senator asks for a brief statement as to why Moral Rights should be enacted. Apart from the posit of the question supplying the answer as to whether Moral Rights presently exist, the difficulty it poses is enormous. A dissertation on the place of art and artists in a country

that claims to be civilized cannot briefly be presented. However, Congress should certainly rebalance the David and Goliath relationship between filmmakers and film companies, between artists and their patrons; it should preserve the rights of artists to protect their work which, along with politics, science and religion defines the soul of any country. The consequences of the lack of Moral Rights protection for filmmakers and the failure to distinguish between owner and author can result in the situation described in our reply to a question by Senator Leahy:

> "Under current American law we are now faced with the following absurd situation: a Japanese corporation (Sony) is now the author of the BRIDGE OF THE RIVER KWAI, THE BATTLE OF THE CORAL SEA, KING RAT, FROM HERE TO ETERNITY and THE LAST EMPEROR. Sony can release these films so cut or changed that their meaning, cultural and historical impact is completely reversed thereby offending both the moral and patriotic rights of the true creators of the film. This is to say nothing of their absolute right under current law to destroy the negatives in order to deny the future any opportunity to view the films. The Senator should know that the Japanese excised, from the exhibition of THE LAST EMPEROR, in Japan, all footage relating to the rape of Nanking. Clearly this was an attempt to distort history. One can only wonder what will happen to THE BATTLE OF THE CORAL SEA or THE BRIDGE ON THE RIVER KWAI if, indeed, they are ever seen again.
>
> The definition of "authors" lies at the heart of most of the difficulties faced in the debate over this issue."

Q: IF THE ESSENCE OF THE DIRECTORS' COMPLAINTS IS THAT THEIR NAMES APPEAR ON WORKS THAT NO LONGER ARE TRUE TO THEIR ARTISTIC VISION THEREBY HARMING THEIR REPUTATION, WHY WOULDN'T A CHANGE IN THE LAW THAT ALLOWED THE DIRECTOR TO INSIST THAT HIS OR HER NAME BE REMOVED FROM THE FILM BE SUFFICIENT?

MR. GUMPEL, WOULDN'T SUCH A CHANGE BE AN APPROPRIATE AND LEGITIMATE ISSUE IN YOUR BARGAINING WITH THE PRODUCERS? HAVE YOU SUGGESTED SUCH A CHANGE?

6. The essence of our complaints is not simply damage to our reputations; the reward of any artist is not simply coin received, it is in fulfilling a need to communicate with society.

In addition, the appearance of the name fulfills the requirement for visibility which in a large number of cases is the preface to employment. "Out of sight, out of mind" - out of mind, out of employment - out of employment, out of the opportunity to create new works. Removal of credit, other than by the choice of the artist, could be a most damaging action.

The Senator should know that in the absence of Moral Rights protection, in collective bargaining, the Directors Guild was forced to make a painful request of the motion picture companies: the right to use a pseudonym if a director's work, prior to the release of the film, were, in the projected release, to be distorted in a way he/she felt would be damaging to his/her reputation. (Our proposal to Congress postulates triggering Moral Rights only after release of the film). The companies responded passionately and negatively; the name of the director on the film was an important signal to exhibitors and to the general audience regarding the questions;

a) Who made the film?
b) Did the released film have the maker's approbation by virtue of his/her "signature" (credit)?

The result of this negotiation was a blue ribbon committee composed of equal numbers of company and DGA representatives which is to reach decisions in case the issue of pseudonym is raised on a theatrical film. A majority would rule. Considering the economic value of the director's name and the negative signal a pseudonym would give the marketplace, it is unlikely that any company would give its approval for a pseudonym and create the possibility of a majority.

It should be noted that whatever the result of this agreement, it applies only to members of the Directors Guild and not to foreign directors whose countries may be signatory to the Berne Treaty.

Any artistic effort is intended to communicate an idea or a feeling. In the broad sense it is "speech" governed by aesthetic principles.

Speech which is anonymous loses some of its societal and historical value and impact much as does an unsigned letter from an invisible

accuser. Artists have, through history, signed their works. The marketplace recognizes this by valuing a signed painting over an unsigned painting even though both may be attributed to the same author.

Q: DO YOU THINK CONGRESS SHOULD LEGISLATE CONTENT OF MOTION PICTURES? WHY ISN'T THAT WHAT WE WOULD BE DOING IF WE ENACTED LEGISLATION BANNING THE BROADCAST OF COLORIZED MOVIES?

7. Congress should not legislate the content of motion pictures. Colorization defaces a film. It may not change content. However, another defacement, indiscriminate cutting of motion pictures most certainly does affect the content of a film and Moral Rights legislation would serve to discourage this evil. In this case Congress would not be legislating content, it would be legislating the right of the artist to protect the product of his/her own mind, a protection considered sacred in American constitutional tradition and in Copyright law.

Q: WHEN YOU MAKE AN ANALOGY BY ASKING HOW MEMBERS OF CONGRESS FEEL WHEN THEIR REMARKS ARE MISQUOTED OR TAKEN OUT OF CONTEXT. YOU BELIEVED WE FEEL OUTRAGED AND THAT YOU FEEL THE SAME WAY. WELL, WE DO FEEL OUTRAGED, BUT I DO NOT KNOW OF ANY MEMBER WHO HAS SERIOUSLY ADVOCATED THE ADOPTION OF A LAW THAT GIVES MEMBERS OF CONGRESS THE RIGHT TO APPROVE ANY QUOTATION. WE ARE PUBLIC FIGURES WHO PUT OUR REPUTATION AND INTEGRITY AT THE MERCY OF OTHERS EVERY DAY. WHY SHOULD THE REPUTATION OF DIRECTORS' HAVE SOME SPECIAL PROTECTION THAT PLUMBERS, DRY-CLEANERS AND EVEN POLITICIANS NOT HAVE?

8. The difference between misquoting a member of Congress and misquoting an artist by defacement of his/her work is that the member of Congress has a chance to correct the record. With regard to the reference to plumbers and dry cleaners surely the Senator will acknowledge that there is a different (<u>different</u>, not better or higher) societal role between artists and artisans. When was the last time the plumber signed the pipe fitting? And how could he be misquoted?

Q: IN YOUR STATEMENT YOU ARGUE THAT AMERICAN FILMS ARE FINANCIALLY SUCCESSFUL BECAUSE OF THE GUARANTEED EXPLOITATION ON MARKETS OTHER THAN

THEATRICAL RELEASE, SUCH AS NETWORK TELEVISION, SYNDICATED TELEVISION, CABLE TELEVISION, VIDEO CASSETTES, LASER DISCS, ETC. OTHER WITNESSES TELL US THAT THESE OTHER OUTLETS ARE EXACTLY WHAT IS THREATENED BY THE POSSIBILITY OF ENACTING MORAL RIGHTS LEGISLATION. IN THE LIGHT OF THE RECENT "SERAFINO" DECISION IN ROME WHICH STATED THAT A DIRECTOR HAD THE RIGHT UNDER THE INTEGRITY RIGHT TO OBJECT TO ANY COMMERICAL INSERTION OR OTHER EDITING OF HIS FILM, AREN'T THESE SUBSEQUENT OUTLETS THREATENED BY MORAL RIGHTS?

9. The release of a film to the public as it was originally made (and approved by the studio or financier) is hardly a guarantee of a threat to sales. The suggestion, made by our opposition, that this would be the case is absurd, snide and contemptuous. They have presented no evidence, only speculation, to support their fears.

Moral Rights, as delineated in Article 6bis of the Berne Treaty do not prevent defacement. They merely permit an objection by the artist. Our opposition would prefer that we be prohibited from crying, "ouch!"or to do anything to discourage another blow.

Q: THE AMERICAN SYSTEM OF COPYRIGHT HAS BEEN DESIGNED TO PROMOTE THE PRODUCTION OF CREATIVE WORKS BY PROVIDING FOR A LIMITED MONOPOLY ON USE OF THE WORK. IT MAY BE TRUE IN GENERAL, THAT AN INCENTIVE IS CREATED BY LAWS THAT ASSURE ARTISTS THAT THE WORKS THEY CREATE WILL REMAIN UNALTERED WITHOUT THEIR CONSENT. HOWEVER, UNLIKE FINE ARTS, MOTION PICTURES ARE SELDOM MADE WITHOUT THE FINANCING OF A MAJOR CORPORATION. IN YOUR OPINION, WOULD ADDITIONAL MORAL RIGHTS PROTECTION SIGNIFICANTLY ENCOURAGE THE CREATION OF NEW WORKS IN YOUR FIELD? WON'T MORAL RIGHTS LEGISLATION PRIMARILY PRESERVE OLD WORKS, RATHER THAN ENCOURAGE NEW ONES?

10. It is important to note here again that our proposal is that Moral Rights be triggered only <u>after</u> "the first paid public exhibition of the film following previews, trial runs and festivals." This position was adopted in order that Moral Rights not interfere with the employer/employee relationship during the creation of the film. What comes out of the interplay of interests, during the fimmaking process, both economic and artistic, finally results in a

finished film which the employer/studio/financier approves for release. Moral Rights has absolutely no impact on the film prior to that approval and prior to that release. Any statement which implies the reverse misrepresents our position.

The use of the words "fine arts" confuses the issue. The dictionary makes a distinction between "fine" arts and "useful" arts, (New College Edition, The American Heritage Dictionary - fine art 1) art produced or intended primarily for beauty alone rather than utility. 2) Any of such art, including sculpture, painting, drawing, and often architecture, literature, drama, music and the dance.). It is true that films are expensive. It is also true that the "honor and reputation" of filmmakers is seriously affected by how these films are received. Their future employment ("the creation of new works") is determined by the reception of the work at exhibition. Please keep in mind that none of the CEO's of any of the major companies has ever made a film. No corporation has ever made a film. They have financed those who do and then they determine whether the result in the marketplace warrants refinancing (re-employment) of the filmmaker. Surely the Senator has heard the phrase "You are only as good as your last film.". The appearance of that film in a defaced form, seen by a potential employer/financier or an audience may determine whether that film maker ever works again.

Q. THE UNITED STATES HAS TRADITIONALLY RELIED ON PRIVATE CONTRACTUAL SOLUTIONS RATHER THAN LEGISLATIVE INTERVENTION. THE DIRECTORS GUILD HAS SIGNIFICANT BARGAINING POWER IN NEGOTIATING STANDARD INDUSTRY CONTRACTS. WHY CAN'T YOU AND THE OTHER GUILDS NEGOTIATE A CONTRACTUAL SOLUTION TO THE PROBLEMS YOU RAISE, RATHER THAN ASKING CONGRESS TO INTERVENE?

11. The answer to this question lies elsewhere in these documents but in summary: First, no contract between the Directors Guild and the companies can protect foreign directors or American directors who are not members of the Directors Guild. Second, Moral Rights are a human right and are not properly left to a labor bargaining process any more than would freedom of speech. Third, even if the first two points were not true, the uncertainty bred by putting an important principle such as Moral Rights up for renegotiation every few years would certainly create havoc

among distributors who would not know whether they are permitted to deface with impunity or not.

The question presumes that the producers would agree to bargain over the subject and not assert that threats of economic action to secure moral rights were not unlawful. It further presumes that the subject of moral rights is not a matter of societal concern and thus should be deferred to private collective bargaining. A similar approach would have required legislation governing health and safety and equal employment opportunity to be deferred by Congress to private collective bargaining.

Q: MR. FORMAN HAS TESTIFIED THAT THE REAL REASON FOR MOTION PICTURE ARTISTS' URGE TO CREATE IS PRIDE, THAT YOUR "NAMES ARE OUT THERE FOR EVERYONE TO SEE AND JUDGE." YOUR COLLEAGUES IN THE AMERICAN SOCIETY OF CINEMATOGRAPHERS HAVE ASKED THAT WE REQUIRE A LABEL DISASSOCIATING THEIR NAMES WITH FILMS ALTERED WITHOUT THEIR CONSENT. THIS APPROACH WOULD SEEM TO PROTECT THE INTEGRITY OF AN ARTIST'S NAME WITHOUT GRANTING HIM THE "MORAL RIGHTS VETO" THAT THE PRODUCERS AND ENTERTAINMENT INDUSTRY EXECUTIVES FEAR. WOULD THIS LABELING APPROACH MITIGATE AT LEAST SOME OF THE CONCERNS YOU RAISE IN YOUR TESTIMONY?

12. We do not support or agree with the testimony of David Fleming who does not represent the great majority of American cinematographers. We refer the Senator to letters sent to him by the International Photographers Guild over the signature of its President, George Spiro Dibie. There is something useful in attaching labels to films advertising any defacements. This is one of the principles of the National Film Preservation Act supported by the Directors Guild. However, labeling is a consumers' rights approach not a Moral Rights approach and does nothing to protect films from material alteration.

Q: MR. FORMAN INDICATES IN HIS WRITTEN STATEMENT THAT THE DIRECTOR IS THE "PRINCIPAL ARCHITECT" OF A MOVIE, ALTHOUGH MANY OTHER CINEMATIC ARTISTS CONTRIBUTE TO THE FINAL PRODUCT. IN CONSIDERING THE MORAL RIGHTS OF ARTISTS, WHAT SHOULD CONGRESS DO TO PROTECT THE CONTRIBUTIONS OF THESE OTHER ARTISTS? CAN WE REALLY EXCLUDE SCREENWRITERS, CINEMATOGRAPHERS, AND OTHER CONTRIBUTORS FROM RECEIVING PROTECTION? WOULDN'T THE PROFITABILITY OF FILMS BE SHARPLY CURTAILED IF ALL THESE CONTRIBUTORS HAD TO BE CONSULTED BEFORE ADAPTING A FILM TO ANOTHER MEDIUM?

13. In the long history of art there are so many examples of the contributions made by an artist's staff of assistants to the final work that it does not serve to list them here. The International Photographers Guild will confirm that cinematographers aid the director to fulfill his/her vision of the final film. A similar statement would be made by other creative guilds and, in fact, has been made before Congress by

Ginger Rogers representing the Screen Actors Guild. Surely the Senator's staff makes enormous contributions to his legislative activities but no one confuses them with him. He makes the decisions. He asks questions which may have been prepared by his staff but he carves out the area of inquiry and supplies the political, moral and professional direction for his office. His name is on the bills he endorses. He is the Senator. No other person speaks for him without his permission.

The Senator should be aware that the DGA has testified that it believes that Moral Rights should extend to the true authors of a film, the director and the screenwriter.

Q: SEVERAL MONTHS AGO, CONGRESS BECAME EMBROILED IN A DEBATE OVER FUNDING FOR THE NATIONAL ENDOWMENT FOR THE ARTS. AT THAT TIME, MANY ARTISTS ENCOURAGED US NOT TO GET INVOLVED IN DECISIONS CONCERNING WHAT IS ART AND WHAT IS NOT. AREN'T YOU ASKING US TO BECOME INVOLVED IN JUST THAT SORT OF DECISION MAKING? CAN THE ARTS COMMUNITY HAVE IT BOTH WAYS?

14. No one is asking Congress to legislate content or determine value. Quite the contrary; we are asking Congress to recognize that the artist not the bank has the right to determine content of a product of the mind.

Q: THE REPORT PREPARED BY THE REGISTER OF COPYRIGHTS, CONCERNING MORAL RIGHTS IN THE FILM INDUSTRY, SUGGESTS THAT INDEPENDENT FINANCING OF FILMS BY AMERICAN DIRECTORS IS POSSIBLE, THOUGH DIFFICULT. EUROPEAN DIRECTORS FINANCE THEIR OWN FILMS AS A MATTER OF COURSE. CAN'T AMERICAN DIRECTORS WHO WANT TO RETAIN CERTAIN MORAL RIGHTS PURSUE THE SAME OPTION?

15. Please refer to Milos Forman's answer.

Q: ACCORDING TO MR. NOLAN'S TESTIMONY, 2 OUT OF 3 FILMS FINANCED BY MAJOR PRODUCERS FAIL TO RECOVER THEIR COSTS IN THE THEATER. WHY SHOULD CONGRESS MAKE IT ANY MORE DIFFICULT, IN THIS RISK INTENSIVE BUSINESS, FOR PRODUCERS TO RECOVER THEIR COSTS IN THE VIDEO AND TV MARKETS? WOULD YOU AS CINEMATIC ARTISTS BE WILLING TO ACCEPT FEWER OPPORTUNITIES TO PRACTICE YOUR CRAFT IN EXCHANGE FOR GREATER CONTROL OVER THE FINAL

PRODUCT?

16. Congress should not accept Mr. Nolan's testimony on its face without questioning him about the difference between production companies and distribution companies, both of which often exist under the same corporate umbrella but receive different income streams. The right hand (distribution) often makes money while the left hand (production) is made to bear the burden of costs and is far more likely to show losses. This is particularly true because showing losses on the production books eliminates the dollars which might otherwise go to profit participants who share only in profits if they are shown on the production books.

However, even if costs are not recovered "in the theater" there are many other ancillary markets which contribute substantially to the income stream of the copyright owner. Since that stream is based on an approved film, Moral Rights has little or no effect on it.

The second question implies a mutual exclusivity which we feel is unjustified. We contend that Moral Rights enhances the opportunities for artistic expression and the preservation of the intellectual product of the artistic community.

All of this aside however, if the economic history of filmmaking is so punishing, why have none of the major studios ever failed?

Senator DECONCINI. I thank you, Senator, for your interest in this subject matter and for pursuing it so much.

Let me just ask—I'm sorry we're running out of time here—your testimony is extremely helpful because it demonstrates, in my opinion, the significance of who you represent and who you are. Indeed, you are creative people who are, in my opinion, unique, and that's what copyrights and patents are all about.

I just thought of this, and I only ask you this for your short response, if you would. I'm trying to find something between Jimmy Stewart and Ted Turner. Maybe some of you say there is nothing in between; "We're Jimmy Stewart, and that's the way it's got to be." But just for discussion purposes, what if you granted a general moral rights bargaining position that could and would be a part of collective bargaining, and then you tried to arrange things so that in the event that there was inability to reach an agreement, there would be some arbiter, somebody, a panel of artists as well as movie producers, that would arbitrate whether or not this was such a classic that it could not be touched—or, "No, by gosh, to me this fell into a category that it shouldn't."

Let me have your reactions, Mr. Stevens.

Mr. STEVENS. Well, I think it would be worth considering.

Senator DECONCINI. Mr. Gumpel?

Mr. GUMPEL. We would think it would be worth considering as well.

Senator DECONCINI. Mr. Forman?

Mr. FORMAN. Yes.

Senator DECONCINI. Thank you, gentlemen. Thank you very, very much for your helpful testimony.

Our last panel is Mr. Roger Mayer, president, Turner Entertainment Co.; Mr. David Fleming, general counsel, American Society of Cinematographers; Mr. Jonathan Klein, vice president and general manager, WJZ–TV, Channel 13 of Baltimore; and Ms. Jan DeMasse, president of Video Place, representing the Video Software Dealers Association.

We will ask you, if you would, summarize your testimony because of the time constraints here. Your full statements will be in the record.

We will start with you, Mr. Mayer.

STATEMENT OF ROGER L. MAYER, PRESIDENT, TURNER ENTERTAINMENT CO.

Mr. Mayer. Thank you, Mr. Chairman. I am Roger Mayer, president of Turner Entertainment Co., a subsidiary of Turner Broadcasting. I have been an executive in the motion picture industry for 36 years. I was with MGM for 25 years, where my duties included administrative control of the MGM studio, where many of these pictures were made, and the MGM library of film. For the last 3 years I have supervised the Turner Co., which distributes, preserves, and services the MGM, Warner Brothers, and RKO libraries, as well as the new films which are now made and acquired by Turner.

This subcommittee is being asked to consider the importation of foreign concepts, the effectiveness of which is highly questionable,

even in their own countries, and whose antecedents seem—to us, at least—to be antithetical to our own system. These concepts would bring change and, I maintain, possibly a reasonable amount of havoc, to an industry which is clearly the most admired and successful in the whole world.

Turner owns, at a cost of over $1.4 billion, the world's largest film library. Our ability to adapt these properties to the many various markets is crucial if we are to effect the widest possible dissemination to the public of creative works, a constitutionally grounded public policy.

The basic premise of applying European so-called "moral rights" to the American motion picture industry seems to be that film directors and perhaps many others would be given the right to veto post-production and post-release modifications for distribution here and outside the United States. Under current law, a producer-director and/or writer can obtain these rights through individual contract negotiations or collective bargaining, as you have heard. and a few of unusual stature do so. However, typically and for very good reason, these rights are retained by the risk-taker, the production company, the studio, or the distributor.

Movie-making is always a business enterprise and sometimes, but all to rarely, an art form, the most collaborative art form imaginable. Scores of creators are jointly responsible, as you have just heard. I am an alumnus of the Hollywood studio system. In those days, if there was one creative force, it was that of the studio head. Staff producers were hired and fired; they, in turn, hired and fired directors, writers, and all other creators. Often a director wasn't called in until a shooting script was ready and all other creative personnel were in place, chosen by the producer. Sometimes directors were called in to replace other directors after shooting had begun.

Movies were produced by large companies as commercial ventures in order to entertain the public and make money for all concern. The broadest possible ownership rights were obtained from directors, writers, and other personnel in exchange for large salaries and, sometimes, profit percentages. For their part, the owners received control of distribution, advertising, and use in secondary markets. The studio's money was at stake. Directors and others did not, and still do not, return their salaries if the film proved unsuccessful.

It is the successors to the original studios, such as Turner, who have both the contractual right and the greatest incentive to preserve and distribute these old movies in order to maximize their investment. The greater our freedom to adapt to changing markets, the greater the benefit to the public through the broadest possible access to the great film heritage we own.

Movie-making today is even riskier than in the heyday of the studio system and still a highly collaborative effort. Only 10 percent of today's feature films recoup their investment through first-run theatrical release, and you have heard about the secondary markets. The willingness of the studio investor to finance a film is directly related to the investor's ability to market that film. The film copyright owner must know that if, as is likely, the picture is still in the red after first-run theatrical release, it can license it to

all the aftermarkets. The ability of even one, let alone several, creative contributors to stop or even delay the use of these markets will chill the desire of investors to gamble on the vagaries of the movie business. It will chill innovation, since even intrepid investors will, more than ever, opt for the tried and true.

I would like to make a comment that there have been discussions concerning colorization, using such words as "destruction." Please, I would like to correct the record on that. Nothing is destroyed. The black and white negative remains. Both versions, both colorized and black and white, are distributed together. It is not a matter of simply making more money; it is a matter of giving the public a choice of different versions. The public can make that choice. In many cases, the black and white exceeds the color in popularity, but in any event we are perfectly willing to have the public decide that.

We also have had comment about the fact that we contribute, in an era of staggering trade deficits, a surplus of over $13 billion annually to the trade balance—that's all copyright industries—and American films contribute $2.5 billion.

The application of European moral rights concepts not only threatens a flourishing American industry, but it raises serious public policy questions, and applied retroactively is, in all likelihood, unconstitutional. We urge this committee to consider these issues carefully. We don't think our copyright system is broken, so we don't feel that it needs to be fixed. It seems to work brilliantly to the benefit of creative incentive, to the benefit of an industry which is the envy of the world, and to the benefit of this country.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Mayer, with attachments, follow:]

Summary Statement
Roger L. Mayer - Turner Entertainment Co.
Subcommittee on Patents, Copyrights and Trademarks
October 24, 1989

Congress has already decided that the network of federal, state and common law already provides sufficient protection for artists' rights to enable us to join the Berne Convention. The current American copyright system, including these protections, has enabled American creative industries to dominate the world. Our copyright system promotes public availability of creative works by providing economic incentives which spur the creation and dissemination of new works, giving copyright owners the financial incentive to produce and distribute creative works, and allowing copyright owners and users the flexibility to enter business arrangements that make works available to the public.

This subcommittee is being asked to consider legislation which would import a "European-style moral rights" regime to this country. But there is no clear consensus on what this system is. The various European systems differ greatly among themselves, and some systems waive, ignore, or restrict the application of moral rights to such an extent as to make their usefulness highly questionable. Certain aspects of "European style moral rights" would conflict violently with long held and valuable American concepts such as the exclusivity of copyright, the fair use doctrine, the "limited time" restriction of the Constitution, and the dependability of contractual relationships.

In the old days of the Hollywood studio system, creative contributors were hired on salary by the dozens to effect the vision of the studio "moguls." The studio took all the financial risk, and the employees were paid regardless of whether a movie succeeded or failed.

In today's Hollywood, filmmaking is an even riskier business, with an average per picture cost of $30 million. Only 10% of today's films recoup their costs during first-run theatrical release. Access to secondary markets such as broadcast and cable television, foreign distribution, videocassette sales and rentals, and airlines is thus crucial to investment decisions.

We agree with the Library of Congress that the retroactive application of "European-style moral rights" to films produced prior to enactment in all likelihood would violate the takings clause of the Fifth Amendment. In addition, retroactive application of "moral rights" to bar practices such as colorization raises First Amendment concerns.

The ablility of creative contributors to object to adaptations or derivative uses could result in decreased incentive to invest in new technology. It could also result in decreased ability to invest in new creative talent and ideas, because foreclosure of secondary markets for films places increased pressure on the success of first-run theatrical release, meaning greater use of established stars and formats with proven box-office appeal.

In conclusion, our system works very well, and those who would change it bear the substantial burden of proving that changes are necessary.

Statement of Roger L. Mayer

Turner Entertainment Co

October 24, 1989

Committee on the Judiciary

Subcommittee on Patents, Copyrights and Trademarks

United States Senate

Mr. Chairman, my name is Roger Mayer. I am President and Chief Operating Officer of Turner Entertainment Co., (TEC) a wholly owned subsidiary of Turner Broadcasting System, Inc. (TBS). Thank you for this opportunity to testify before your subcommittee as you consider the question of moral rights in the film and entertainment industry.

I have been an executive in the motion picture and television industries for approximately 36 years, first with Columbia Pictures, then MGM, and now with TEC. I was with MGM for 25 years, most notably as Senior Vice President of Administration and as President of the MGM Laboratory. My main duties included administrative control of the MGM studio and the MGM library. For the last three years I have supervised the Turner subsidiary which distributes, services and preserves the great MGM, RKO and Warner Bros. film libraries.

TBS now owns, at a cost of over $1.4 billion, the world's largest film library, composed of over 3,600 motion pictures, 1,700 hours of television programming, and 4,000 short subjects and cartoons. These properties are marketed both in the United States and throughout the world via cable and broadcast television, videocassette sales and rentals, and theatrical distribution. Our ability, as the copyright owner, to adapt these properties to the various markets is crucial, not only to our business but to our capacity to fulfill the constitutionally grounded public policy of the widest possible dissemination to the public of creative works.

My testimony today will cover the following subjects: the nature of the proposed changes in current law you are being asked to consider; the nature of the "European system of moral rights;" the old Hollywood studio system, under which most of the films in our library were made; the modern filmmaking industry; constitutional questions; public policy issues respecting retroactive legislation; and public policy issues respecting prospective legislation.

The nature of proposed changes in American copyright law

As we understand it, this Subcommittee is being asked to explore the possible enactment of so-called "moral rights," similar to provisions thought to be in place in Europe, which would be applicable to the motion picture industry. The basic premise appears to be that film directors and perhaps many others would be given the right, perhaps inalienable, to veto a multitude of post-production or post-release modifications made to films during the various distribution processes. The types of practices involved may include subtitling and dubbing for foreign distribution, panning and scanning so that a film may be shown on television, time compression and expansion, various types of editing, and colorization, as well as various processes not now known or contemplated.

Under current law, a director can obtain these veto rights, but only through individual contract negotiations or collective bargaining. Typically, and for good reason, these rights are retained by the production company or studio, although there have always been exceptions for directors or producers of unusual stature, from Orson Welles to David O. Selznick to Steven Spielberg.

Last year, during consideration of the bill to implement the Berne Convention in the United States, Congress found that this country already protects the rights of authors to an extent sufficient to allow us to join Berne. This finding was based on a close examination of various federal statutes, state statutes, and common law. Copyright law, the Lanham Act, and common law concepts such as libel, unfair competition and false advertising, taken as an amalgam, all converge to protect the basic integrity of an author's work, as required by article 6(bis) of the Berne Convention. In addition, creative contributors have the ability to negotiate for additional rights through the collective and individual bargaining processes.

It is no exaggeration to say that American copyright-intensive businesses are the healthiest and most productive in the world. We dominate the world in the fields of filmmaking, magazine publishing, data base services, music publishing and textbooks, to name a few. In an era of staggering trade deficits, the American copyright industries combined contribute a surplus of over $13 billion annually to the U.S. trade balance.

American films dominate theatre and TV screens throughout the world and contribute a surplus of $2.5 billion to the U.S. trade balance. In contrast, as the Washington Post recently reported, "foreign-made films barely make a ripple in the United States," and are in serious economic difficulty in their own markets. Indeed, the French government has recently announced its intention to provide a direct annual subsidy of $30 million to promote domestic production of motion pictures. The House report on the Berne Convention confirms the financial distress of the foreign film industries, noting that foreign film producers feel that moral rights have hurt foreign film production. (H.R. Rept. No. 100-609, 100th Congress, 2nd session at 36 (1988).)

American creative industries have reached this position in large part because of the nature of our copyright system. This system promotes the public availability of creative works by providing economic incentives which spur the creation and dissemination of new works. The current Copyright Act gives copyright owners, whether business entities or individuals, the financial incentive to devote resources and energy to producing and distributing creative works, allows copyright owners and users the flexibility to enter freely into business agreements that make works available to the public, and provides both copyright owners and users with the certainty that their business activities will be governed

by the objective terms of such traditional business agreements and will not be hindered by the subjective judgments inherent in the "European system of moral rights."

In light of the undeniable success of the current copyright system, a very large burden of proof rests with those who would change the system.

In considering the wisdom of grafting a "European-style moral rights system" onto American copyright law, we urge the committee to carefully examine the precise nature of moral rights and how they are implemented in other countries. We are concerned that advocates of adopting broad-ranging moral rights legislation may not have a thorough understanding of how such mechanisms work elsewhere. We are confident that such a review will underline the minimal benefits and high potential costs of altering the legal foundation of our film and video industries.

The nature of the "European system of moral rights"

It should not be a foregone conclusion that because different systems of moral rights have long existed in Europe, alien European concepts can necessarily be grafted onto the American system, or thatthey are necessarily superior. Nor should it be assumed that moral rights have had a benign effect abroad. This notion requires analysis in two parts: first, the nature of moral rights in Europe, and second, the practical impact if these European concepts are imported and superimposed on our current system.

As to the nature of moral rights in Europe, it appears to be far from a settled question what rights do in fact exist in any uniform, coherent sense. Some countries' statutes condition the exercise of the paternity right on the presence of "reasonable" circumstances or "fair" practices, or words to that effect, so that the element of objectivity is introduced. Some countries allow moral rights to be waived in a signed writing, after which they may not be reasserted by the author. Even France, generally regarded as having the most vigorous moral rights regime of all, prohibits the exercise of the integrity right in an "absolute" or "arbitrary" manner. Many countries prohibit moral rights objections to changes made in the process of adaptation or creation of a derivative work. France has even prevented the application of moral rights to their computer software industry, apparently in order to promote its growth.

These and many other examples of the very uncertain nature of moral rights in Europe are well documented in the paper submitted by Ambassador Nicholas Veliotes during your September 20 hearing, entitled "Preserving the Genius of the System; a Critical Examination of the Introduction of Moral Rights into United States Law."

Indeed, it may be that at least in some cases the "European system of moral rights" is actually moving closer to the American system. As an example, I would draw your attention to the recent decision by the French Court of Appealsin Huston v. Societe d'Exploitation de la Cinquieme Chaine de Television, Le Cinq, (Paris Appeals Court, decided July 6, 1989). In this case, the heirs of the renowned American director John Huston brought suit to prevent a French broadcast of the colorized version of "Asphalt Jungle," to which Turner owns the copyright. Their claim was based on Mr. Huston's moral right to prevent an adaptation of his movie to which, during his lifetime, he had clearly objected. The plaintiffs were successful in the trial court, but that decision was overturned on appeal. The Appeals Court held that, under the rules of international conflicts of laws, American law must be applied, and that under American law, colorization was permissible. The Court then proceeded to hold that "colorization, in itself, cannot be criticized by the heirs of Huston ... even if they could invoke a moral right in the film in black and white." (Page 15.) In other words, colorization is not an affront even to French moral rights.

This opinion illustrates that the scope of enforceable "moral rights" in Europe may be far more narrowly circumscribed than the Directors' Guild and other advocates of importing "moral rights" to this country understand them to be. I include a translation of this decision as part of my testimony.

Perhaps the most fundamental difference between the various European systems and ours is that, unlike the United States, most European countries have developed a situation where the various copyright intensive creative industries have evolved over hundreds of years alongside the doctrine of moral rights. These industries, such as publishing, filmmaking, broadcasting, and the like, have arrived in the 20th century with a history of accommodation, both statutory and judicial, to the prevailing concept of the rights of creative contributors. When motion pictures were invented in the early years of this century, European countries where would-be filmmakers lived already had moral rights systems, within the confines of which a new industry was conceived.

Quite the opposite is true in the United States. Our copyright-intensive industries have matured in a system which relies on contracts and property rights, which safeguards the predictability and certainty of business transactions, and which does not recognize the subjective opinion or caprice of a contracting party.

The Directors' Guild's position, as we understand it, would conflict with the long-standing American notion of the exclusivity of copyright by allowing an author, after he has sold the exclusive right to reproduce his work and make derivative uses of it, to prevent the creation of such derivative uses. Moral rights would restrict the fair use doctrine by allowing an author to prevent the use of his work in such valuable

activities as teaching, scholarship, news reporting, parody and critical commentary. Because many countries regard moral rights as continuing in perpetuity, these rights may violate both the "limited time" restriction of the Constitution as well as the prevailing notion here that personal torts, such as defamation and invasion of privacy, expire with the death of the complainant. And then there is the basic and proper refusal of the American judiciary to make what are essentially subjective assessments regarding matters of taste and sensibility.

The old Hollywood studio system

Until the 1950's, Hollywood movies were conceived, financed, executed, and distributed for the most part by the giant studios run by the well-known Hollywood "moguls." Of course, there was an occasional rare exception, such as Orson Welles. But in the overwhelming majority of cases these movies were the "children" of the studio heads. They were not the "children" of the scores of salaried collaborators, including directors, who, to implement the studio head's vision, were traded among studios, hired and fired, assigned projects by the mogul or a staff producer, and replaced during shooting if their work didn't satisfy. (A famous example is The Wizard of Oz. In short order three directors were assigned to the movie, and removed from it, before a fourth director finished the film.) These movies were produced by large companies as commercial ventures in order to entertain the public and thereby make money for all concerned. The broadest possible ownership rights were obtained from directors, writers and other personnel, by collective and individual bargaining under employment agreements, in exchange for large salaries and sometimes profit percentages. For their part, the owners received control of the methods and manner of distribution, advertising, and use in the various secondary markets. In these business ventures, it was the studio's money at stake. Directors and others did not return their salaries if a film was unsuccessful. They were (and are) paid regardless of the quality of the resulting product.

It is the successors to the original studios, such as TBS, who have both the contractual right and the greatest incentive to preserve and distribute these old movies, in order to maximize their investment. The greater our freedom to adapt to changing markets, the greater the benefit to the public through the broadest possible access to the great film heritage we own.

The modern Hollywood system

The business of modern filmmaking has become even riskier than in the heyday of the studio system. Today a feature film costs an average of almost $30,000,000 to produce and distribute. Only 10% of today's feature films recoup their investment through first-run world-wide theatrical release. In all other cases the only hope for breaking even is through full exploitation of all additional markets.

The willingness of a potential investor (including major studios) to finance a film is directly related to the investor's perceived ability to exploit the film in all possible ways and places. Under current law, the owner of the copyright in a film knows that if, as is almost certain to be the case, the picture is still in the red after first-run theatrical release, he can license it to cable or broadcast television, rent and sell it in videotape format, license it for in-flight use on airlines, and distribute it to foreign countries after having it dubbed or subtitled. With these tools, he has a much better chance, although still no guarantee, of redeeming his investment. The ability of even one, let alone several, creative contributors to stop or even delay the use of these markets will chill the desire of investors to gamble on the vagaries of the movie business (and all other creative businesses including television, music, records, book and magazine publishing, etc.).

As an indication that "European-style moral rights" can have a negative impact on investment in entertainment programming, I would point out that last week an Italian Court ruled that it is a violation of a deceased director's moral right for a television station to insert commercials during the broadcast of his film. In addition, the court ruled that the director's heirs can dictate whether, how many, and where commercials may be inserted. Italian directors themselves note that this decision may result in reduced funding for future films. I enclose an article on this decision from the October 18, 1989 edition of Variety.

The role of labor negotiations has also changed. The various guilds representing creative contributors are among the strongest unions in the country. Agreements with members of the Directors Guild of America, for example, typically run to hundreds of pages, containing dozens of hotly negotiated provisions ranging from precise credit rights to profit participation to adaptive consultation. There is no question but that these guilds enjoy bargaining power relatively equal to that of the studios and independent producers who employ their members. We all remember the havoc wreaked on the television industry when the television writer's union went on strike in 1988.

In the modern system of making films, parties of relatively equal bargaining power engage in protracted negotiations in which each side seeks to maximize their profit and control. The producer, facing greater investment risks than ever before, negotiates with various creative contributors, who enjoy greater autonomy and influence than ever before. The result is a balanced, productive working relationship in no need of legislative interference.

Constitutional issues

Legislation to allow the exercise of "European-style moral rights" with regard to works copyrighted prior to the date of possible enactment of new legislation must undergo severe constitutional scrutiny. There is

a very high degree of probability, for example, that colorization legislation which bans the distribution and exhibition of colorized versions of movies copyrighted prior to enactment would violate both the First and Fifth Amendments to the Constitution.

In his recent report entitled "Technological Alterations to Motion Pictures," (March 1989) the Register of Copyrights states that "(a) new federal moral right affecting preexisting works, the copyright of which is owned by individuals other than the beneficiary of the new right, raises serious constitutional issues under the "takings" clause of the Constitution," (page 159) and thus concludes that " (a)ny future legislation should extend moral rights prospectively only to works created on or after the date of enactment..." (page 182).

Indeed, these doubts about the constitutionality of a retroactive ban caused the Register to call into question "the need for any legislation, since very few motion pictures are now created in black and white, and those that are will probably be created by directors with sufficient individual bargaining leverage to prohibit colorization." (Page 160.)

Our attorneys have also looked into this question, and have concluded that a retroactive ban on colorization would also violate the free speech guarantee of the First Amendment. We also agree with the Register that such action would violate the taking clause of the Fifth Amendment.

Public policy issues respecting retroactive legislation

Our company is greatly concerned about all the technologies that could be affected by the "European system of moral rights," including colorization. During the consideration of the National Film Preservation Act last year, we made a commitment to voluntarily label all movies that we colorize, regardless of whether they are chosen for the National Film Registry, using the labeling language contained in that law. We have and will continue to actively market and make available the black-and-white versions of the movies we colorize. In addition, Turner enjoys the reputation of being one of the most active copyright owners in the field of film restoration and preservation, spending more than $30,000,000 in recent years in this area. Thus, in terms of "truth in advertising" and film preservation, our company is already doing much more than is required by current law. A major motivation to make these large expenditures is our freedom to distribute our movies and hopefully recoup the investment.

An important public policy question raised by retroactive legislation concerns future development of entertainment technology. While technologies such as panning and scanning, time compression and foreign-language dubbing and subtitling have existed for decades,

colorization was invented only a few years ago. We are currently witnessing the rapid growth of relatively new industries such as direct broadcast satellites and high-definition television. The pursuit of technological innovation in the media is grounded in the assurance of the current system that when a better mousetrap is invented, there will be cheese with which to bait it. Uncertainty as to whether individual creative contributors may lodge protests against the adaptation of their work to new uses may prove to have a chilling effect on the development of technologies as yet undreamt of.

Public policy issues respecting prospective legislation

While a large part of our concern about the "European system of moral rights" involves our ability to distribute our old films to the public, we are also concerned about restrictions on the distribution ofnew works. Our newest cable network, Turner Network Television (TNT), now one year old, has become a major player in the Hollywood production community, and we plan to spend almost $1 billion over the next 5 years on original series, mini-series, and movies produced exclusively for TNT. We hope to enter other new creative fields as the opportunity arises. Our TNT product and other projects will require freedom of distribution in other media throughout the world to recoup its cost and enable us to continue to finance future productions and give employment to many creators.

There is a high probability that, depending on the precise nature of the proposal, "European-style moral rights" legislation of a prospective nature affecting the motion picture industry could drastically alter the nature of that business. Such legislation could deprive copyright owners of the unfettered ability to distribute their property, or, at minimum, subject that ability to substantial uncertainty. Thus, a vastly increased financial risk is introduced into the investment process. When an investor faces increased financial risk, he is understandably less willing to invest in an experimental, untried, but nevertheless creative and possibly useful enterprise. This may mean that, because the prospective investor in a filmmaking venture knows he must rely more heavily on the success of a first-run theatrical release, he is more likely to rely on safer, more "bankable" material or participants. It is quite possible that moral rights legislation may thus redound to the benefit of established artists, "name directors," and formula scripts, and to the detriment of unknown talent and creative but untried techniques.

Conclusion

This Subcommittee is being asked to consider the importation of concepts from other countries, whose effectiveness is highly questionable and whose antecedents are antithetical to our own system, in order to change an industry which is clearly the most successful, productive and

competitive in the entire world. The retroactive application of these concepts is in all likelihood unconstitutional, and their prospective application raises serious public policy questions. We urge this Subcommittee to carefully consider these issues during any future deliberations on the "European system of moral rights."

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A. R. G.

APPEAL AGAINST THE JUDGMENT OF
THE TRIBUNAL DE GRANDE INSTANCE DE PARIS -
1ST CHAMBER - dated 23rd November 1988

COURT OF APPEAL OF PARIS

4th Chamber, section B

Decision of 6th July 1989

TURNER ENTERTAINMENT CO.

Vs.

1) Madame Angelica HUSTON
2) Monsieur Daniel HUSTON
3) Monsieur Walter HUSTON
4) Monsieur Ben MADDOW
5) La Société des Réalisateurs de Films (S.R.F.)
6) Le Syndicat Français des Artistes-Interprètes (S.F.A.)
7) La Fédération Européenne des Réalisateurs de l'Audiovisuel (F.E.R.A.)
8) Le Syndicat Français des Réalisateurs de Télévision C.G.T.
9) Le Syndicat National des Techniciens de la Production Cinématographique et de télévision
10) La Société des Auteurs et Compositeurs Dramatiques (S.A.C.D.)

Vs.

The Public General Prosecutor before the Paris Court of Appeal

FACTS AND PROCEDURE OF 1ST INSTANCE)

On the 2nd May 1950, the American company, LOEW's Inc, parent of the film company METRO-GOLDWYN-MAYER (M.G.M.), obtained from the Copyright Office in the UNITED STATES a registration certificate conferring on the company the copyright in the film "ASPHALT JUNGLE" directed by John HUSTON and filmed following a screenplay written by himself and Ben MADDOW ;

The copyright was renewed on 2nd May 1977 by M.G.M. after a change in the corporate structure of LOEW's. Succeeding to the rights of M.G.M. in its "library" on 5th August 1986, the company TURNER ENTERTAINMENT Inc. made a colorised version of the "ASPHALT JUNGLE" for which it was granted on 20th June 1988 by the American Copyright Office a registration certificate ;

It is in these circumstances that the 5th Television Channel (LA 5) announced on 28th June 1988 the broadcast of the colorised version of the film which, however, the judge of summary committal prevented by an order dated 24th June 1988, at the request of the HUSTON heirs and Ben MADDOW, on the grounds that such a broadcast would lead to intolerable and irreparable damage against those defending the integrity of the work of HUSTON ;

This decision was confirmed by a decision of the Court of Appeal of Paris on 25th June 1988 ;

Moreover, by an action dated 30th June 1988, Angelica HUSTON, [widow] of the deceased director, Daniel and Walter HUSTON, his sons, and Ben MADDOW sought a fixed hearing in order to obtain an injunction against LA 5 preventing it from proceeding to broadcast in its colorised version, not only the "ASPHALT JUNGLE" but also any work of which John HUSTON was the author ;

LA 5 contested the admissibility of the claim, and TURNER, voluntarily joining the action as principal party, claimed that as sole author of the litigated work, it had the sole right to exercise the moral right in the work in France ;

For the other side, the SOCIETY OF AUTHORS AND DRAMATIC COMPOSERS, the French Syndicate of ACTORS, the European Federation of AUDIOVISUAL DIRECTORS, the Society for DIRECTORS OF FILMS, the French Syndicate of TELEVISION DIRECTORS and the National Syndicate of TECHNICIANS FOR FILM PRODUCTION and TELEVISION intervened to oppose TURNER on the grounds that TURNER's arguments attacked the rights of creators and artists ;

THE APPEALED JUDGMENT

By its judgment of 23rd November 1988, the Tribunal de Grande Instance de Paris :

- declared admissible so far as it concerned solely the television broadcast of the colorised version of "ASPHALT JUNGLE", the action of the HUSTONS and Ben MADDOW and the voluntary intervention of TURNER

- declared at the request of LA 5 that LA 5 renounced any broadcast of the said version and, so far as necessary, injuncted LA 5 from proceeding to such television broadcast

- rejected the remainder of the claim

- rejected the claim of TURNER

APPEAL

On 5th January 1989, TURNER appealed against the judgment and was authorised to take a fixed day, which it did on 25th January 1989, requesting all of the parties to appear at a hearing before this chamber on 12th May 1989 ;

The summons asked the Court to overrule the judgment on the principal grounds that the HUSTONS, who did not qualify as authors of the film "ASPHALT JUNGLE", were inadmissible to invoke a moral right which they did not possess, and secondarily that colorisation constitutes an adaptation in legal terms, that the right to adapt is a patrimonial right which belongs to TURNER and which the HUSTONS, in the absence of a defective adaptation, which was never alleged, could not paralyse the exercise of the right by invoking the moral right to which, in itself, colorisation caused no harm ;

TURNER claimed from the HUSTON estate the sum of 50 000 Francs on the basis of Article 700 of the New Code of Civil Procedure ;

In other written arguments submitted on 9th May 1989, TURNER asserted again the above arguments specifying that the identification of the author of the litigated film must be carried out by applying the law of the United States of America, the country of creation, and requesting the Court to judge that by virtue of the above mentioned law and agreements, the identity of the author belonged

not to the HUSTONS and Ben MADDOW, but to TURNER, the successor in title to M.G.M./LOEW's, and that the recognition of TURNER as the author did not cause any harm to the conception of French Public Order in the realm of author's moral rights ;

On 10th May 1989, LA 5 asked the Court to overturn the appeal judgment, by saying that it was not contested that the protection of the integrity of the work "ASPHALT JUNGLE" in the French territory was dependent on French law, but that the question of the identity of the author was a matter for the country of origin of the work, CALIFORNIA, and secondly that French Public Order could not be used in effect to challenge in FRANCE a Californian law which determined the identity of the author of the film "ASPHALT JUNGLE" ie. TURNER, and not the HUSTONS/Ben MADDOW, who cannot invoke any moral right in FRANCE ;

It was also claimed that colorisation constitutes a legal adaptation in the sense of the law and conventions and that in the absence of any particular harm spelt out by the plaintiffs, the Tribunal could not consider the concept of colorisation itself as an affront to moral rights. LA 5 concluded that it would give the following undertakings :

- to set out before any broadcast, in a special declaration, that the colorised version of "ASPHALT JUNGLE" produced by TURNER is an adaptation of an original work filmed in black and white ;

- to broadcast, at the time the film is scheduled, a notice reminding television viewers that they have the ability not to watch the film in colour by using the colour control knob on their television ;

LA 5 brought an action against the HUSTONS/MADDOW and the intervening parties for the payment of 1 Million Francs in damages and 50 000 Francs under Article 700 of the New Code of Civil Procedure ;

The HUSTONS/MADDOW sought for the re-affirmation on 11th May 1989 of the appealed decision and for the condemnation of TURNER to a payment of 100 000 Francs pursuant to Article 700 of the New Code of Civil Procedure. They emphasized that the solution adopted by the first judges in granting the benefit of a moral right under French law to the physical person who contributed to the creation of the work was an imperative whether on the basis of the body of international conventions applicable to copyright, or even outside such conventions. In particular, they emphasized that the United States of America had just adhered to the Berne Convention which took effect immediately with respect to contentious issues which were not yet resolved as well as extra-contractual situations arising subsequently to its entry into force and they based their claim to authorship on a sole reference in Article 14 bis-2-a of the said Convention under the terms of which "the determination of the holder of the copyright in a cinematograph work is reserved to the legislation of the country in which the protection is sought" ;

In addition, defining colorisation not as an adaptation but as a distortion, they claimed that this procedure was totally unforseeable by the parties at the time when HUSTON and MADDOW contracted with M.G.M., and they therefore could not be deemed to have authorised such a process and that even if they had done so, the gravity of the harm done to the work must lead one to judge that the character of international Public Order in relation to moral rights would render void any contractual stipulation to the contrary ;

On 11th May 1989, the society of Authors and Dramatic Composers, which sought permission from the Court to have its intervention admitted voluntarily, stated that it granted to the HUSTONS/MADDOW the entire benefit of its support ;

On 12th May 1989, five other associations or syndicates made the same statement in order to support the claims of the HUSTONS/MADDOW and each sought from TURNER and LA 5, on the basis of Article 700 of the New Civil Procedure Code, the sum of 10 000 Francs ;

On the same day, in its concluding reply, TURNER asked the Court to declare that the adherence of the United States to the Berne Convention only took effect from 1st March 1989 and that this adherence did not alter the effect of the American contracts entered into before the said date between American nationals for works born and created in the United States and that such adherence was without any impact on the identification of the author of the "ASPHALT JUNGLE", and that, secondly, the application of Article 14 bis-2-a of the Berne Convention did not exclude the application of American law by the French judge in order to identify the author ;

In the final written evidence of 12th May 1989, the HUSTONS/MADDOW claimed that the appeal by LA 5 was inadmissible on the grounds of the undertakings given to the first judges in relation to its renunciation of any broadcast of the colorised version, and also because of the late delivery of its evidence ;

In addition, the President of the Court, having on 27th April 1989 given an order to the parties obliging them to explain before 10th May various matters concerning the production of the litigated film, they claimed that they have been in an impossible position to reply to this request and to TURNER's conclusion of 9th May and that of LA 5 which, on 11th May, opposed any rehearing and claimed the admissibility of its appeal by asking the Court not to make a judgment on the issue of non-admissibility raised by the HUSTONS/MADDOW who asked the Court to ignore the substantive issues and to declare exclusively on the latter, seeking secondarily, in the event that LA 5's appeal would not be judged inadmissible, to rehear the matter in order to make a reply ;

THE COURT

Which in order to more fully understand the facts, the proceedings and the arguments of the parties, referred to the appealed judgment and to the appeal evidence

WITH REGARD TO THE APPELLANT

Whereas the HUSTONS/MADDOW appointed lawyers on 6th February 1989, that is to say more than 3 months before the audience on the 12th May indicated in the summons for a fixed day hearing served at the request of TURNER ;

That they have therefore had all the time necessary to prepare their reply to the arguments of the appellant ; that notwithstanding, the litigation would have been presented in appeal in the same conditions as at first instance if they themselves had not extended their previous arguments by reference to the Berne Convention in the written evidence received only the day before the pleadings and to which TURNER could only reply on 12th MAY ;

In addition that, the order given to the parties 15 days before the pleadings could not have taken the HUSTONS/MADDOW by surprise since the role effectively played by John HUSTON in the creation of "ASPHALT JUNGLE" occupied an eminent place in the argument in the judgment which is being appealed ;

That, finally, LA 5 finding itself cited in the appeal of TURNER, its submissions, tending to give to its renunciation of any broadcast of the litigated work a simply provisional character, were not unexpected and in addition did not change the essential facts of the argument on the moral right invoked by the HUSTONS /MADDOW which do not, to the extent of their opposition to a seriously motivated decision on non-admissibility, give grounds for any complaint of any violation to their detriment.

ON THE ADMISSIBILITY OF THE APPEAL IN RELATION TO LA 5

Whereas in its written evidence at first instance, LA 5 had opposed as being without object the claim of the HUSTONS/MADDOW since the order forbidding it to broadcast the colorised version of "ASPHALT JUNGLE" was confirmed by the decision of 25 June 1988 and it had respected this injunction ;

That the renunciation which it had asked the Tribunal to declare could no longer have any impact on the decision at law to which it was connected, as confirms the tense applied to the verb "to renounce", that is to say, the past composite which concerns what has been done and not the present which expresses that which is valid for all times ; in addition the tribunal judged it pointless to forbid, in so far as was necessary, the broadcast of the said version ; that having an interest in having an anulement of such a provision, it has a claim incidental to the appeal, the admissibility of which cannot be contested ;

ACCESSORY INTERVENTIONS

Whereas the admissibility of the interventions of the six companies being associated with the arguments of the HUSTONS/MADDOW is not disputed ;

ON THE CONFLICT OF LAWS

Whereas the appealed judgment recognised in the HUSTONS/MADDOW characeristics enabling them to demand in FRANCE the protection of their moral right in "ASPHALT JUNGLE" on the grounds that even if TURNER is the sole holder of the patrimonial right in the work, it could not also be the holder of the moral rights which attach to the actual individual creators who were, in spite of the American law and contractual stipulations, HUSTON and MADDOW, these arguments being based on the benefit of the provisions of the Universal Convention of Geneva which does not exclude from its field of application moral rights, and by virtue of which the benefit of the law of 11th March 1957, specifically Article 6, ensures national treatment to foreign authors of litigated films which are shown in our country ;

Whereas the appellant and LA 5 were justly aggrieved by the above reasoning which ignored the conflict of laws clearly outlined by TURNER whose conclusions claimed that according to the law of first publication of the work in the UNITED STATES, the quality of authorship in "ASPHALT JUNGLE" was solely vested in the person of LOEW's. In addition, although the Geneva Convention does not concern moral rights, it does protect works, but without intervening in determining the identity of their authors ; it therefore does not derogate from the rule according to which it is the law of the country of origin that must be referred to in order to identify the author ;

Whereas it is true that the arguments presented before the Court are to be seen in a new light since at the end of 1988, the UNITED STATES became a party to the Berne Convention which takes effect from 1st March 1989, and from which American nationals may derive benefits in France, despite certain reservations, the exact effects of which remain unknown, the consultation of Professeur FRANCON submited by the HUSTONS/MADDOW more than a month after the hearings only cites extracts from the American law of ratification dated 31st October 1988 ;

Whereas it is claimed by the HUSTONS/MADDOW that their argument in favour of their recognition as having the characteristics of authors derives from the said Convention and in particular Article 14 bis-2-a, under the terms of which, the determination of the holders of the copyright in the cinematograph work is reserved to the legislation of the country from which the protection is sought ;

Whereas even to admit that the use of the plural (the title holders) does not signify that the text only concerns works of collaboration, which would exclude those in which the producer exercises all of the rights, it is vital to emphasize that the BERNE CONVENTION, conceived as an instrument of harmony between the contracting states, with a view to the best protection for artists and creators, would see its authority gravely undermined if the law of the country where protection is claimed was to become a means to overrule the norms of another signatory state, and the rights acquired under that other regime ; it would follow from this that one could only extract from such an operation positive benefits for authors ; as a consequence, in determining the holder of the moral right, French law can certainly benefit an American citizen, but on condition that the advantage accorded by virtue of the principle of assimilation does not lead to any negation of any right acquired in a work in the UNITED STATES under American law by a person other than the claimant ;

Therefore one cannot, on the facts, ignore that TURNER holds the copyright wich it received from M.G.M./LOEW's in "ASPHALT JUNGLE" and that the BERNE CONVENTION itself insists that this be respected ; that these rights bear, under American law no restriction flowing from any moral right, and the film being therefore something which TURNER is free to modify as it sees fit, one cannot see how the arguments of the HUSTONS/MADDOW on the exercise in FRANCE of moral rights in relation to the integrity of a work could be upheld without injuring the legitimate patrimonial interest that it is incumbent on a French judge to protect ;

In addition, no one could claim to be an author in FRANCE without satisfying the rules set out in the law of 11th March 1957 which relate to the manner of acquisition of this benefit ; in this respect it is appropriate to recall that the first prerogative of the author, that which conditions all others, is the right of publication which, according to Article 19 of the said law, only belongs to the author ; it is consistent throughout the documents furnished during the debates that neither MADDOW nor John HUSTON published "ASPHALT JUNGLE" in

the original black and white version ; likewise, it has not been established, or at least only alleged, that this version was, before its publication, preceded by an agreement between the producer and the co-authors, analogous to that foreseen in Article 16 of the law of 11 March 1957 (as modified by the law of 3rd July 1985) ;

Whereas in addition, the rights held by TURNER in the black and white version are the unavoidable consequence of the agreements entered into between the American parties , M.G.M./LOEW's on the one part, HUSTON and MADDOW on the other part, in the state of CALIFORNIA ;

That on this point, it is necessary to remark that if American law ignores moral rights, it does not prohibit their recognition by a particular contractual provison ; in this respect, HUSTON and MADDOW worked, not under an agreement relating to a particular film, but pursuant to work contracts under which they were engaged to provide to the producer/employer such artistic services as they demanded ; the employer was the holder of the right to modify and/or revise the "litterary materials" destined for filming, would decide whether the production should proceed on the basis of the prepared material, whether to entrust to persons other than the employees contributions otherwise due from them, be that litterary material or filming ; the employer was the sole beneficiary of all of the fruits of the services of his employees, including their rights, throughout the world, in production, broadcast, and reproduction by whatever technical means or method, without any reserve, condition or limitation ;

It follows from the above stipulations that M.G.M./LOEW's did not become the holder of the copyright simply by reason of an assignment agreed to by HUSTON and MADDOW of the completed work and which, as patrimonial rights, according to French conceptions, preserved a principle of moral rights ; it is to the contrary perfectly clear that at no moment did HUSTON and MADDOW have the least right in the film during its creation for which the will, however capricious, of the producer could exclude them at any moment and replace them with any other person and M.G.M. LOEW's would judge when the work was in their opinion complete and would also decide whether or not to publish or carry out, after publication, any modifications which seemed to them appropriate ;

That in referring to the French law in order to claim the exercise in FRANCE of a moral right in "ASPHALT JUNGLE", the HUSTONS/MADDOW are attempting to escape from the contractual agreements entered into in CALIFORNIA, thereby placing in danger the legal security to be expected in contracts and this is even more unacceptable when such a repudiation concerns a cinematograph work of which neither HUSTON nor MADDOW could deny that it was given a large circulation outside the United States and in particular in our country where "ASPHALT JUNGLE" was projected under the title "QUAND LA VILLE DORT" in a synchronised version ;

That nothing in the BERNE CONVENTION permits the invocation of the legislation of one State in order to undermine contractual obligations subscribed to in another State ;

Whereas it is true that in order to render meaningless the efficacity of contractual stipulations, one is forced to admit that such provisions must be overridden by the fact of creation ;

That the judgment welcomes this argument ;

That however, the lower courts' search for the reality hidden under the fiction is fragile since, without researching how the contracts actually operated, it denies the role of the producer in the creation of the film by relying on false premises which reflect the traditional views in France of the relationship between producer/director, certainly accurate for French cinema for some decades, but which can not be transposed, without damage to the truth of what actually happened, to the epoch in which "ASPHALT JUNGLE" was created according to the practice of large Californian studios ;

Whereas the documents introduced in the discussions do not contradict the letter of the contract which itself corroborates what is public knowledge that is to say

- that the producers, such as M.G.M. - LOEW's, were not simple providers of funds, often strangers to the world of cinema, bringers of capital permitting a director to make, with sole authority, a film conceived by him and created with collaborators chosen by him, but rather these producers were commercial men placed at the head of companies with the object of generating profits purely through the production and broadcast of films ;

- that these authoritarian financiers, who did not have any time for fantasy, were geared to a rigourous control and containment of artists and technicians with a view to enforcing respect for filming time limits, restricting the length of films to the projection time customarily expected, and surveillance to ensure that no failure to observe current aesthetic or moral rules would compromise the desired success ;

Whereas nothing in the supplied documentation would lead one to believe that the standing of John HUSTON rendered contractual provisions meaningless or that the producer was not totally involved in the conception and creation of the film and had the final word in all matters from the choice of the subject matter provided by BURNETT's novel which he decided to adapt, right up to the definitive editing, and in particular with regard to the script on which the director operated ;

Whereas it has not been established that the contracts were only legal shams hiding the reality of creation of which it was vital to take account ;

Whereas, at the very least, all of the elements taken together, whether of fact or of law, and submitted to French legal analysis, forbid the abandonment of American law and the setting aside of the contracts and as a result leads one to deny to the HUSTONS/MADDOW any possibility of being the beneficiary of a moral right

under the law of 11th March 1957, this the law of conflict decides, the only remaining question being whether the demands of Ordre Public in FRANCE would justify the rejection of the foreign legislation which is normally applicable ;

ON ORDRE PUBLIC

Whereas in international private law, the exception of Public Order is a reaction of intolerence to foreign law which must be exercised with great care and not simply on the occasion of any serious divergence from the law of another State ;

That the requirements of French Public Order are to be analysed in a more rigorous manner than ordinary laws and must only be upheld when to do otherwise would undermine the very foundation of the law on which French society rests in relation to political, social or family order ; recourse to the exception obliges one to show the very high value of what one wishes to preserve, the absence of any damage that might be caused to other principles no less respectable and recognised in France, and finally, that the gravity of the harm which would otherwise result is beyond what is acceptable ;

Whereas it is necessary to note that the first Article of the Law of 2nd January 1968 as amended, in relation to trademarks, attributes to the employer the ownership of the invention made by an employee in the execution either of a contract of work, incorporating a duty to create inventions which corresponds to his actual activities, or of studies and research which are explicitly entrusted to him ;

That in the same domain of artistic and literary ownership, the rule so adopted for the inventions of employees has inspired the drafters of the law of 3rd July 1985 with regard to the treatment of software ; in addition, if article 14 of the law of 11 March 1957 makes an audiovisual work a work of collaboration of which the co-authors are physical persons, this is only a presumption, subject to contrary proof, and there is nothing to prevent the recognition, in the present case, of a film as having the character of a collective work in which the company could claim at law the quality of an author on the basis of having taken the initiative, directed the creation and proceded to its publication ;

Whereas in the light of the above observations, one can doubt that the copyright granted to LOEW's in 1960 in "ASPHALT JUNGLE", a film created in conditions bringing it within the definition of a collective work under French law, is of such a nature as to conflict violently with the sentiments which in our country are the basis of protection of works of the spirit ; in addition, it is not without an element of self-flattery for French realities that the opponents of TURNER oppose, in a manichean way, the UNITED STATES as being exclusively concerned with profit

and with forcing producers to acts of vandalism on black and white films, as compared to FRANCE, presented as the guardian "par exellence" of the rights of creators, in spite of the proliferation of ghost-writing in litterature and, with regard to cinema, abuses of censorship, generating a heavy self-censorship and consequently an unfortunate inhibition in the choice of subject matter;

Whereas in addition, even under domestic laws, the character of Ordre Public inherent in moral rights is of a variable intensity, the right of paternity being imposed with more force than that of integrity in the work, which infringes upon the exercise of the patrimonial right ;

That to prevent TURNER from exploiting the colorised version of "ASPHALT JUNGLE" in FRANCE, for which a new copyright was granted, would end in depriving the company of its rights in the incorporeal property which benefits from constitutional protection and such an injury could only be justified if in the general interest and on condition of an indemnity, the constitutional norm being attached to the conditions set out in article 32 of the law of 11 March 1957 relating to the exercise by the author of his right to withdraw ;

That another counter-weight to the moral right resides in the necessity to guarantee to the public access to developments carried out in audiovisual communication, LA 5 emphasizing on this point that the great majority of television viewers are rejecting old films made in black and white, and only colorisation will be able to lead them to become familiar with these works, which are at present greatly ignored ;

Whereas, finally, John HUSTON and Ben MADDOW freely and in full possession of their faculties signed the contracts by virtue of which colorisation, unforseeable in 1948, has been nevertheless carried out in the UNITED STATES, in a legal manner, and not, it must be emphasized, on French territory where TURNER has limited itself to broadcasting the colourised version of "ASPHALT JUNGLE" ; HUSTON and MADDOW are therefore subject to the authorianism of M.G.M., that is to say, they weighed-up the value of the advantages which would flow to them from the strong organisation of a large studio and the effect on their reputation which would not be that which it became without the resources for diffusion for which the films on which they worked benefitted throughout the world ; in the interest of exporting these films, they did not fail to expressly consent to all procedures known at the time of the contract, or which were by nature to the film's advantage, and in particular dubbing, for which they could not pretend not to know that it would distort an English-speaking film ;

That as a question of the protection of public order, it would be excessive to liken the harm alleged here to the integrity of the work to the damage that foreign nationals, in particular children, without any contract, might be subjected by the application of customs that our civilization rejects as harmful to the most sacred attributes of the human person, for example physical integrity or freedom of mariage ;

Considering all of the above arguments, it is necessary to conclude that the concerns invoked by the HUSTONS/MADDOW are not at the level of principles permitting the application of an exception to public international order ; it follows from this that the French law cannot be substitued for that which provides a correct solution to the conflict of laws ; as a result, no moral right could, on the basis of the law of 11th March 1957, oppose broadcast in France and, in particular, by LA 5, of the colorized version which will in any event be subject, if it is mediocre, to the sanction of the market place ;

ON COLORISATION

Whereas the procedure adopted by TURNER for the colorisation of "ASPHALT JUNGLE", apart from adding colour, also involves alterations which are to take into account the destination of the work so created which, in principle and in fact, is to be television broadcast and not projected in the commercial theatres ;

Whereas COLOR SYSTEMS TECHNOLOGY, used in this case, is, according to the Bureau of Authors at the Congress of the UNITED STATES, sufficiently creative for registration to be granted to colorised films, thus treated as an adaptation of the work in black and white, which should be so recognised by French law thereby opening up a different form and giving new access to situations and characters ;

Whereas the copyright granted to TURNER in 1988 on the derived work would remove from the HUSTONS/MADDOW, if they had a valid moral right, any possibility of declaring the latter a distortion of the first work, except, which is not the case, where they alleged a defect in the quality of the adaptation ;

That one could not close the discussion of these badly founded arguments, which will be rejected by overturning the judgment referred to us, without stating that LOEW's - M.G.M., TURNER, who ensures the good conservation of films, left in the UNITED STATES to private initiative, has neither distroyed nor altered the work in black and white which it could commercialize again in cinemas if there was a public demand ;

Whereas it will be ordered at LA 5's request that LA 5 will broadcast a notice reminding the television audience of the possibility of watching the colourized film in black and white in the terms indicated in the judgment ;

Whereas the heirs of John HUSTON, even if they are not included in the copyright succession, are the guardians of his memory ; in this respect, and to the extent that they estimate that the prestige that John HUSTON enjoyed as a director could be damaged by the new impressions given by colorisation in which he has no role, it is appropriate to grant them the right to make the public aware

by applying a "meta-legality" which intervenes in matters which touch the most personal attributes of the human being, but without harming the patrimonial right of the third party, as, in this case, TURNER ;

That natural law finds some support here from the positive law of the UNITED STATES which, whilst not recognizing the right of paternity and integrity in the work, tends to disapprove of the false attribution to someone of participating in a creation ;

Whereas, as a result, in making the order requested by LA 5 so that it is obliged to announce to television viewers that what is going to be presented to them is the adaptation in colour of a film made in black and white, there should be space to add to the warning a statement of the opposition shown by the HUSTONS to the colorisation of "ASPHALT JUNGLE", the information being given in fixed terms on the positive copy of the film and for all broadcasts in FRANCE ;

ON THE COUNTER CLAIM OF LA 5 AND
THE APPLICATION OF ARTICLE 700 OF THE N.C.P.C.

Whereas LA 5 could not justify any harm susceptible of giving rise to an award of damages ;

Whereas it is not inequitable to leave each party to bear their own fees not included in the fees borne in the present hearing, and the same will apply to expenses ;

ON THE BASIS OF THESE ARGUMENTS

Declaring admissible the incidental appeal of LA 5 and finding it well-founded as well as the principal appeal of TURNER,

Held that the author of the film "ASPHALT JUNGLE" is TURNER and that the heirs to John HUSTON as well as Ben MADDOW have no moral right in this work filmed in black and white ;

Declares that the colorised version of the said film is according to American law an adaptation for which TURNER has obtained a certificate of registration dated 20 June 1988 ;

Held that colorization, in itself, cannot be critized by the heirs of HUSTON and Ben MADDOW, even if they could invoke a moral right in the film in black and white ;

As a result , in granting the appeal,

Rejects the claims of the HUSTONS and Ben MADDOW and finds admissible but badly-founded the interventions of the six companies associated with their argument ;

Authorises LA 5 to broadcast the colorised version of the film "ASPHALT JUNGLE" on condition of the following requested orders ;

That as far as necessary before any broadcast a warning to television viewers that they have the ability not to watch the film in colour by using the colour control knob on all televisions ;

That in addition, for all use in FRANCE of whatever kind, the colorized version of the film "ASPHALT JUNGLE" (titled in French "QUAND LA VILLE DORT") must bear the following warning :

"In respect for the memory of John HUSTON, screenplay writer and director of this film made in 1950 in black and white, his heirs oppose the projection in FRANCE of this colorised version created in 1986.

Ben MADDOW, co-screenplay writer, joins in this declaration.

By a decision of 6 July 1989, the COURT OF APPEAL of PARIS, 4th Chamber - B, rejected the above opposition but stated that the spectators or television audience would be informed of the opposition of the HUSTON estate".

Held that this warning must figure at the beginning of the film, immediately after the title, and at the end, after the word "fin", in the same characters as those used for the credit indicating the role played by John HUSTON in the black and white film and that it shall stay on the screen for 20 seconds ;

Held not to award damages to LA 5 ;

Rejects all claims formed pursuant to Article 700 of the New Civil Code ;

Held that each of the parties will bear their own expenses of the earlier hearing 4 and the appeal to which they have been exposed.
..."

END OF TRANSLATION

SERRA & ASSOCIES
Cameron McCracken

VARIETY Wed., Oct. 18, 1989

Italo Court Bars Tv Blurbs In Pic

By JENNIFER CLARK

ROME — The Court of Appeals handed down a precedent-setting ruling with potentially devastating consequences for private tv operators in Italy and every other country that adheres to the Berne Convention, which as of March 1, 1989, includes the U.S.

The Rome magistrates decided in favor of Francesco Germi, who charged Reteitalia (the software division of Silvio Berlusconi's Fininvest) with damaging the integrity of his father Pietro Germi's film "Serafino" by interrupting it with ad breaks.

The Court of Appeals magistrates ruled that according to the Berne Convention even a single commercial break in a film constitutes an alteration of the work's integrity and

Wed., Oct. 18, 1989.

Berne Ruling Raises Specter Of Pic Blurb Bans On Euro Tv

(Continued from Page 1, Column 3)

therefore violates the director's moral rights.

The "moral rights" provision of the Berne Treaty provides that artists have the right to object to any "material alteration" of their works that would prejudice their "honor or reputation."

Interpretation of this provision, however, varies widely from country to country. In the U.S., this provision was deleted entirely last year when Congress approved changes in U.S. copyright law that brought the U.S. into compliance with the Berne Treaty.

Directors Guild of America spokesman Chuck Warn called the Italian court's ruling a "tremendous victory for artists' rights." He noted that director George Stevens lost a similar case in the U.S. Supreme Court some 30 years ago when he tried to stop the insertion of commercials into his "A Place In The Sun" when it was shown on tv.

Francesco Germi originally filed charges against Reteitalia in 1984 after the first tv broadcast of "Serafino." The Court of Rome ruled at the time that damage to the film should be determined individually case by case, according to the artistic quality of the film on one hand and the number and length of ad breaks on the other hand. Germi appealed.

The new ruling completely upsets the status quo, whereby an offended party had to somehow convince the magistrates that his film was "worth" saving from the ravages of commercial breaks, and states that the integrity of each and every film is altered by advertising.

Naturally, the ruling refers specifically to Germi's "Serafino," which will not be shown on Berlusconi's Fininvest webs in the future, and of course is not valid outside of Italy.

But the ruling could open a Pandora's Box of ills for private broadcasters at a time when commercial television is beginning to penetrate European markets traditionally dominated by public broadcasting monopolies.

The 30-page ruling from the magistrates of the Court of Appeals cites the Berne Convention norm that protects a director's copyright from an "instrumental use of the work for merely commercial ends, which offends the dignity of the work itself." A director or producer can sell the economic rights to their product, but under the Berne Convention they still retain "moral rights."

Regarding the previous decision of a lower court to examine each case separately according to the film, the Court of Appeals observes: "A hierarchy of artistic quality of this sort cannot be left to the judge's discretion."

In any case, the ruling continues, "it is illicit for a third party to decide the number and placing of commercial breaks against the director's will."

Under this interpretation, if the simple act of interrupting a film with a commercial violates a director's moral rights under the Berne Convention, then in theory the same thing holds true for any country adhering to the Convention. It remains to be seen whether other magistrates, in other countries, will follow the same line of reasoning as those of the Rome Court of Appeals.

Anti-ad break sentiment in Italy has been building since the beginning of the year, when it became a political issue after a group of noted Italo directors (including Federico Fellini, Ettore Scola, the Taviani brothers and Lina Wertmuller) banded together to demand that private channels broadcast their films "commercial-free."

Not surprisingly, the Court of Appeals ruling has received mixed reviews.

A loud rumble of irritation has erupted from the Fininvest headquarters, where a spokesman announced that the corporation will appeal the decision to Italy's highest court and said the decision made by the Court of Appeals affects only the film "Serafino" and has no general significance.

Germi's lawyer, Niccolo Paoletti, told *Daily Variety*: "This ruling has a political and cultural significance beyond its purely judicial one. It could force the private stations to start respecting the integrity of a film."

Director Lina Wertumuller notes, "Without production funds from Fininvest, a lot of Italian films would never get made in the first place. I think we should reach an agreement together for an acceptable amount of breaks."

Senator DECONCINI. Mr. Mayer, I am going to ask some questions as we go along here, as time permits.

I just have to express my view, and perhaps I'm not a part of the real public. I don't care for the colorization. I think it degrades the movie. Colorization may make it a little more pleasant for the eye, but the ones that I know of in black and white I like. But that's just my taste. I think movies made in black and white ought to be seen that way, but that's my own preference.

As you well know, that statement is made widely by a lot of people. You say the public supports the other one; I wonder if they really have the choice to see the black and white and then see the color, and then say yes or no, which way. All they really get from you—and no criticism of that—is the colorization. I think that's all I get.

Mr. MAYER. Mr. Chairman, if I——

Senator DECONCINI. Wait. Let me ask you a question, and then you can respond.

What you do, to me, is not a good thing, and it is wrong as to the creativity of the artists here, but it is not legally wrong. You have the right to do that; we understand that. It's not economically wrong because in our economic system you buy it, so you can do with it what you want, and that's what we're talking about here.

I've never had anybody complain to me that the movie that they saw on television was 2 minutes and 42 seconds shorter than the regular movie, or that it was compressed in some other manner. I've never had anyone complain to me that they missed the action on the fringes of a movie screen from the little bit that is taken off of it. I don't notice it, and I don't think most people do.

A lot of people want to stop colorization because they feel it is wrong. Just because there is a great economic benefit—and I understand that clearly—if something is wrong, if it has some moral characteristic of being wrong, why shouldn't we just ban colorization and do nothing more and get this behind us and not have to worry about that problem? That seems to be the biggest problem in moral rights, quite frankly: Colorization. Why don't we just decide not to do that and you show all those great movies in black and white? I bet your company would do just as well as you are doing now.

Mr. MAYER. I don't think that's quite true. We have had very great success all over the world with the colorized copies of these pictures. However, we do show them in black and white. As an example, when they are marketed in video cassette, every single colorized copy is marketed simultaneously with the black and white. They are advertised together. They are in your video cassette stores side by side, and there are no exceptions to this policy.

It is interesting to tell you that in some cases, the black and white outsells the color, and in other cases the color outsells the black and white. In some cases the colorized copy rents more copies, and in other cases the black and white. Interestingly enough, the rental market is different from the sales market. You can see that, because film buffs tend to buy video cassettes, and the more regular market tends to rent them.

Also, it is simply not accurate that the black and whites are not seen. We are showing the black and whites. There are stations that

show both black and white and color. We feel that if you try to ban anything on a creative basis, then you are getting into the same problem that Senator Leahy talked about——

Senator DECONCINI. Let me ask you this. Do you think a work by Michelangelo should be protected, that it can't be altered by the owner?

Mr. MAYER. I think you should protect the original. I do, however, think you could take a copy——

Senator DECONCINI. If somebody wants to make a copy and change it, they should be able to?

Mr. MAYER. Absolutely, and it's done all the time. And in many cases it is done quite poorly. There are directors—the Directors Guild constantly talks about painting a mustache on the Mona Lisa. There are two contemporary painters who actually did that.

Senator DECONCINI. What about music scores that are used in filmmaking, where they are only partially used and permission is not granted from the writer to only use part of a song? That's not an issue here, but should that be protected or not protected?

Mr. MAYER. I'm not sure I understand that, Senator.

Senator DECONCINI. Well, if we were to grant moral rights to the creators of black-and-white films, should we grant moral rights to songwriters that part of their song could not be used in making a film, also?

Mr. MAYER. I think that anything that was granted on any artistic subject should be granted to all artists, and that whatever is done, you must think of its effect on all other art forms, yes.

Senator DECONCINI. Thank you.

Mr. Fleming.

STATEMENT OF DAVID W. FLEMING, GENERAL COUNSEL, AMERICAN SOCIETY OF CINEMATOGRAPHERS, ACCOMPANIED BY STANLEY CORTEZ, CINEMATOGRAPHER

Mr. FLEMING. Thank you, Mr. Chairman. I am general counsel of the American Society of Cinematographers, located in Hollywood, CA. I have with me today a past president of the ASC, a distinguished director of photography who began in the silent era, a two-time Academy Award nominee—who, incidentally, got those nominations for black and white films—Mr. Stanley Cortez.

On behalf of the ASC I want to express our thanks for the opportunity to appear here this morning to share with you the views of cinematographers regarding moral rights.

The ASC is an honorary society of filmmakers, celebrating its 70th anniversary this year. Its membership is by invitation only and is composed of the leading directors of photography in the United States and abroad.

Let me share with you for a moment the role of cinematography in the creation of a motion picture. The cinematographer, known as the cameraman as well as the director of photography, is both a creative artist and a master craftsman. As an artist, he creates on film his vision of the subject matter, employing light, color, perspective, space, and motion. He helps establish the moods and emotions of the viewer. He directs how the camera sees the action. He paints with light and shadows.

The beauty of a film in large degree is attributable to the genius and imagination of the cinematographer. He is, in the words of the late Cecil B. DeMille and of director Frank Capra, "the indispensable ingredient in the creation of a film."

Now, we are aware of the moral rights positions advocated by both the directors and the writers, and of the contrasting positions of the producers and others. We respect all of these opinions, but we, as cinematographers, suggest a middle course that we feel will benefit creators while not harming producers.

We do not subscribe to the argument that any film creator should be given veto power over how the producers or owners of motion picture copyrights may decide to exhibit their pictures in the future. We feel producers and owners should have the right, albeit qualified, to exploit the films they own for whatever economic benefit they can realize, utilizing technology that now exists or may exist in the future.

But qualified how? The cinematographer's artistry, his integrity, his reputation are assets beyond value. They are his stock in trade. For that reason, cinematographers hereby ask you, the Congress, to protect our artistry, integrity, and reputation, in that if a producer or owner wishes to materially alter our members' works, that producer or owner should be required to insert a notice of disclaimer at both the beginning and conclusion of the altered version of the film—in short, a label. The disclaimer should state that the original photography was in a different format to suit the medium in which it is exposed, and that it has been altered without the collaboration of the cinematographer or other creators.

We feel the same labeling rights should apply to the work of other creators, such as directors, writers, editors, actors, and so forth. We submit that the insertion of disclaimers will create no undue burden on producers, financiers, exhibitors, or subsequent owners of motion picture copyrights. Such disclaimers will give us no economic advantage, and we don't ask for any. We simply wish to have preserved, in the future, the integrity of our members' work. Those rights, incidentally, should not be waivable or bargained away. They should not be subject to any economic consideration to give up. It should be against public policy, and any agreement to that effect should be void.

Now, what alterations qualify as "material" ones? We submit that material changes in the color, the light, the perspective, or the contents of the photography of a motion picture should be considered a material alteration. Does that include colorization of black-and-white films made in the future? Yes. Does that include panning and scanning of future films? Yes. It would not include letter boxing since the film's original photographic content is left intact.

So our position is simple. It is a middle ground, similar to the position that Congress has taken regarding the 75 classic films going in the film registry. Let the producers and owners exploit their film properties as they wish. They took the risk in making the films; they should be able to secure present economic benefits. We don't want in any way to discourage film production in this country because we, as cinematographers, are deeply concerned that while we permit foreign cameramen to work in the United

States, in most cases American cameramen are prohibited from working in foreign countries. So we want production to stay here.

Whatever moral rights this Congress adopts, it is our position that we as cinematographers have an equal right to those of directors and writers because we are coauthors and cocreators, and we deserve no less.

A motion picture is an art form that is indigenous to America. Films have captured the imagination and attention of the world. They have in many ways surpassed painting and sculpture as the world's most vital and moving art form, and we as film creators must be accorded protection.

Thank you for allowing us to present the views of America's directors of photography, Mr. Chairman. The ASC is indeed grateful.

[The prepared statements of Mr. Fleming and Mr. Cortez follow:]

Statement of

David W. Fleming

General Counsel for

The American Society of Cinematographers

Before the

Subcommittee on Patents, Copyrights, and Trademarks

of the Judiciary Committee

United States Senate

October 24, 1989

Summary of the Statement of
David W. Fleming
General Counsel for the
American Society of Cinematographers
Before the Subcommittee on Patents, Copyrights and Trademarks
of the Judiciary Committee
United States Senate
October 24, 1989

The American Society of Cinematographers is the oldest honorary society in the film industry. Its members comprise almost all of the leading directors of photography in the United States and many from abroad. Its members have photographed almost every major motion picture made since the beginning of the art form at the turn of this century.

The Director of Photography is also referred to as the Cinematographer as well as the Cameraman. He is an artist as well as a technician in both the creation and the production of a motion picture. As an artist, he paints with light, color, space and motion; he creates what one sees on the screen. As a technician he assumes responsibility for other creative crafts in partnership with the Director.

Cinematographers seek no veto power over the form in which a producer/owner may exhibit his film in the present or future technology. We urge that Congress define as moral rights for all creators the preservation and protection of the integrity and reputation of film creators, including the cinematographer. In the event that a film is materially altered for future exhibition, our moral rights should require that disclaimers be displayed at the beginning and conclusion of a film's exhibition calling the viewer's attention to (1) the presence of material alterations from the original work and (2) that such alterations were done without the consent or collaboration of the cinematographer or other creators of the original work.

We submit that the definition of "material alterations" should include any material changes in the color, light, perspective or content of the photography. Such changes would therefore include the colorization of black and white films and the practice of panning and scanning. They would <u>not</u> include the recently developed technique of letterboxing.

We submit that such rights, while protecting the integrity and reputations of film creators, will not place undue burdens on the producers or financiers of future films; nor realistically discourage future film production in the United States.

STATEMENT OF DAVID W. FLEMING

Mr. Chairman, and members of the Subcommittee, on behalf of the American Society of Cinematographers -- the "A.S.C.," it is an honor to be asked to appear before your committee. In so doing, you are allowing our members the opportunity to participate directly in the legislative process of our government. We sincerely appreciate that opportunity.

I have been general counsel to the American Society of Cinematographers for the past 29 years. On behalf of cinematographers everywhere, the A.S.C. wishes you and the American people to know its views regarding what moral rights, if any, should be accorded the creators of motion pictures over and above the copyright protection under our current laws.

Allow me first to say a few words about the A.S.C. and then to describe to you the role of the cinematographer in the film-making process.

The American Society of Cinematographers is an honorary society of film makers--the oldest organization of its type in the world. Formed in Hollywood in 1919, almost all of the leading directors of photography in the United States and many more elsewhere in the world make up its current roster of members.

Membership is by invitation only. To be eligible for membership consideration, a cinematographer must have first

achieved a high degree of excellence in his or her craft as a director of photography over several years.

When you read the letters A.S.C. after a cinematographer's name, either on the screen or elsewhere, you have an assurance that his or her artistry, professional skill, and dedication to the craft are at the highest levels achievable.

Whether one be called the cinematographer, the cameraman (or woman), or the director of photography, (all three descriptive titles are commonly used) as a member of the A.S.C. he or she is one of a distiguished cadre of motion picture creators.

A sampling of just a few of the more notable films photographed by A.S.C. members is appended to this statement. That list of films speaks more eloquently about our membership than any words I could suggest.

As to the cinematographer's role in the creation of a motion picture, he is really two persons in one -- a creative artist as well as a master of technology.

As an artist, the vision of the subject on film is created using light, color, space, and motion. In directing the photography of a picture, he or she not only selects the film stock, a wide assortment of lenses, the moves the camera should make, the angles and perspectives, but also establishes the moods, emotions, and physiological reactions that occur when pictures on the screen are seen by audiences viewing them. The director choreographs the action. The cinematographer holds the reins on the visceral impression that dramatic passage will evoke.

Like those great impressionistic artists of the past, a major ingredient in the magic the cameraman weaves is his use of light.

Cinematographer Sven Nykvist of the A.S.C., a multiple Academy Award winner with more than 100 feature film credits, recently observed that "light can be gentle, dreamlike, bare, living, dead, clear, misty, hot, dark, violent, springlight, falling, straight, slanted, sensual, subdued, limited, poisonous, calming or pale."

As cinematographer Woody Omens of the A.S.C., a mulitple Emmy Award Winner, points out, "Part of the cinematographer's job is to help the director fill in the spaces between the spoken words, because light is language. Light speaks and shadows answer. They carry on a conversation -- with never a word uttered."

From the cinematographer's imagination there emerges on the screen an array of visual impressions that envelope the audience and stir different emotions in each viewer. Those silent visual messages are sometimes subtle, sometimes awesome, and ever memorable. Those images were put there by the cinematographer -- and no one else.

In describing the role of the director of photography, the late Cecil B. DeMille, one of America's renowned film makers, concluded that the cameraman's imagination and skill render him as the one and absolutely indispensable ingredient in the making of motion pictures. "He is," said DeMille, "above all others, a true artist."

A giant among directors, Frank Capra, recently wrote, "It takes as many talents to make a film, each contributing their share. But if one were forced to make a film with only the talents that are absolutely necessary, one could do away with all but two: The cameraman and the director. That team is the backbone of all film-making and has been since the days of (Cameraman Billy) Bitzer and (Director D.W.) Griffith. If they still had a camera, some film, and a few chemicals, that team could make a film if they were the last people on earth."

As a manager of technology, the cinematographer assumes the responsibility for the accurate rendering of other creative crafts as they bear on the whole imaging process. The subtle tones established by the production designer -- or their hard edges -- must be recorded faithfully to the mood of the scene. Wardrobe must carry and compliment the actors. Make-up must work in harmony with lighting to maximize the actor's performance. Set dressing must not be photographed to overpower the intention of the spoken lines (unless dramatic emphasis is to be placed on a particular part -- as did the diamonds sewn into the gown in "Gaslight"). The cinematographer's knowledge of the performance properties of the film stock, combined with his instructions to the laboratory technician, determines both the physical and aesthetic qualities that an image will have when it is projected onto the screen. The scene <u>does</u> look different in the camera than it will appear when printed on film.

The cameraman, therefore, is, in every sense the transliterator of the author, bringing written descriptions to

visual reality -- a full partner of the director, interpreting his concept for mood and dramaturgy -- and, more often than not, the patron saint of the actor!

So then, what are these co-author's views regarding moral rights of cinema creators?

We are aware of the positions previously voiced by both the Directors Guild of America and the Writers' Guild of America as to their suggestions of how the moral rights clause of the Berne Convention should be interpreted. We, however, differ from our co-workers in some very fundamental respects.

We agree that copyright laws should protect the creators of motion pictures. But we believe they should protect all the creators of a motion picture -- not just directors and writers.

It is our considered opinion that none of us as creators -- whether writers, directors, cinematographers, or anyone else -- should be given a "veto" power over how the producer/owner of a motion picture copyright may eventually decide to exhibit his finished product.

We reject the proposition that creators -- who were, by and large, very well paid for their talents -- should unilaterally or arbitrarily have the right to prevent owners of films from exploiting their properties for whatever economic benefit they can realize, as long as such exploitation is done pursuant to a process in which the integrity and reputations of all the creators of those films are protected.

Because the cinematographer's reputation, both within our craft and among the general public, is related directly to what the viewer sees during the exhibition of his or her work, we feel that henceforth, the moral rights of cinematographers should require that any material alterations of future films, which tend to denegrate the integrity of a film's original photography should require the insertion of disclaimers which should be exhibited at both the beginning and at the conclusion of the film.

Those disclaimers should specifically refer to the fact that the photography has been materially altered from the original photography of that film and that such material alterations were made without the consent and/or the collaboration of the cinematographer.

As to moral rights for other film creators, we feel that our copyright laws should be written to preserve their well-earned reputations. Therefore, any material changes permitted by the copyright owner which would reasonably tend to denegrate such creators' reputations should, for all future exhibitions of the original work, be prominently brought to the viewing public's attention by similar disclaimers.

Next, you may ask, what alterations should qualify as "material alterations."

The cinematographer's answer is simply this. Anything which materially changes the color, light, perspective or content of the photography should be regarded as a material alteration, thereby requiring disclaimers.

Does this definition include the process of colorization of black and white films? Yes.

Does it include panning and scanning? Yes.

Does it include "letterboxing" (a process by which the wide screen picture is shown in full width on a television screen with black borders at the top and bottom)? No -- because the film's original photography is left intact.

We submit that audiences are becoming more sophisticated and the sizes of the average television screens are growing larger. The exhibition of wide screen feature films on television using the letterboxing format, especially in the case of feature pictures on videotape and laser disc for sale or rental, are becoming more and more common, thereby avoiding the necessity for the use of disclaimers.

It is our intent to help encourage the making and financing of films in the United States. American film creators, including cinematographers, have suffered for years from run-away production. Today we deem it abhorrent that while foreign cameramen are allowed to work in this country, in most cases, American cameramen are prohibited from working in foreign countries.

For that reason, we want no undue burden placed on U.S. producers and financers which would tend to discourage them from making future films in the United States or even foregoing the making of pictures altogether. We know that two out of every three films lose money. We do not seek any economic advantage from Congress for ourselves at the expense of the producers. We

want producers to realize whatever economic rewards might be available to them in any form of exhibition that future technology may permit. We only ask that the the cinematographer's reputation for his artistry and integrity, as well as that of other creators, be preserved from whatever material alterations are occasioned by such technology.

On the other hand, should it be the decision of Congress to adopt the moral rights positions previously advocated by the directors and writers, we, of course, would insist that cinematographers should have rights equal to them. Our members stand on equal footing with those collaborators in the creative process of movie making. As co-creators and co-authors, we deserve no less.

Since, however, the future life-blood of this art form will continue to require risk taking by America's future producers and financers, we feel our position on moral rights as enunciated here today will protect both our integrity as the creators of films, while, at the same time, preserving the incentive of others to finance and produce future films.

Mr. Chairman, thank you again for allowing me to present the views of the members of the American Society of Cinematographers to this Subcommittee and to the American public here today.

A Partial List of Prominent Motion Pictures Photographed by A.S.C. Members

The following compilation represents a sample of some of the classic feature motion pictures photographed by A.S.C. members during recent years. Except in four instances, the list does not include any silent pictures (of which there were thousands) nor does it include any motion pictures made specifically for television exhibition. The list represents less than 1% of the features shot by A.S.C. members over the last 70 years.

A single asterisk (*) appearing before a cinematographer's name indicates his nomination for the Academy Award for that feature picture. The appearance of two asterisks (**) signifies the Oscar was awarded him for his photography of that picture. Those films listed in boldface and underlined are films chosen as of September, 1989 by the Librarian of the Library of Congress for inclusion in the National Film Registry.

Feature Motion Picture	Year Photographed	Cinematographer
Abe Lincoln in Illinois	1940	*James Wong Howe, A.S.C.
The African Queen	1951	Jack Cardiff, A.S.C.
The Agony and the Ecstasy	1965	*Leon Shamroy, A.S.C.
Airport	1970	*Ernest Laszlo, A.S.C.
The Alamo	1960	*William Clothier, A.S.C.
All About Eve	1950	*Milton Krasner, A.S.C.
All My Sons	1948	Russell Metty, A.S.C.
All the Kings Men	1949	Burnett Guffey, A.S.C.
An Affair to Remember	1957	*Milton Krasner, A.S.C.
An American in Paris	1951	**Alfred Gilks, A.S.C.
Anatomy of a Murder	1959	*Sam Leavitt, A.S.C.
Anna and the King of Siam	1946	**Arthur Miller, A.S.C.
Anthony Adverse	1936	**Gaetano Gaudio, A.S.C.
The Apartment	1960	*Joseph LaShelle, A.S.C.
Apocalypse Now	1979	**Vittorio Storaro, A.S.C.
Around the World in Eighty Days	1956	**Lionel Lindon, A.S.C.
Arsenic and Old Lace	1944	Sol Polito, A.S.C. Joseph Walker, A.S.C.
The Asphalt Jungle	1950	*Harold Rosson, A.S.C.
Auntie Mame	1958	*Harry Stradling, A.S.C.
The Bad and the Beautiful	1952	**Robert Surtees, A.S.C.
The Bad Seed	1956	*Harold Rosson, A.S.C.
Battle Cry	1954	Sid Hickox, A.S.C.
Battleground	1949	**Paul Vogel, A.S.C.
The Barefoot Contessa	1954	Jack Cardiff, A.S.C.
Ben Hur	1959	**Robert Surtees, A.S.C.
The Best Years of Our Lives	1946	Gregg Toland, A.S.C.
The Big Country	1958	Frank Planer, A.S.C.
The Big Heat	1953	Charles Lang, A.S.C.
The Big Sleep	1946	Sid Hickox, A.S.C.

Birdman of Alcatraz	1962	*Burnett Guffey, A.S.C.
The Birds	1963	*Robert Burks, A.S.C.
		*Ub Iwerks, A.S.C.
The Bishop's Wife	1947	Gregg Toland, A.S.C.
Blackboard Jungle	1955	*Russell Harlin, A.S.C.
The Black Swan	1942	**Leon Shamroy, A.S.C.
Blood and Sand	1941	**Ray Rennahan, A.S.C.
		**Ernest Palmer, A.S.C.
Bonnie and Clyde	1967	**Burnett Guffey, A.S.C.
Born Yesterday	1950	Joseph Walker, A.S.C.
Bound For Glory	1976	**Haskell Wexler, A.S.C.
Breakfast at Tiffany's	1961	Frank Planer, A.S.C.
Brian's Song	1971	Joe Biroc, A.S.C.
Bridges at Toko - Ri	1954	Loyal Griggs, A.S.C.
Brigadoon	1954	Joseph Ruttenberg, A.S.C.
The Buccaneer	1938	*Victor Milner, A.S.C.
The Buccaneer	1958	Loyal Griggs, A.S.C.
Bus Stop	1957	Milton Krasner, A.S.C.
Butch Cassidy and the Sundance Kid	1969	**Conrad Hall, A.S.C.
Butterfield 8	1960	*Joseph Ruttenberg, A.S.C.
The Caine Mutiny	1954	Frank Planer, A.S.C.
Call Me Madame	1953	Leon Shamroy, A.S.C.
Call Northside 777	1948	Joe MacDonald, A.S.C.
Camelot	1967	*Richard Kline, A.S.C.
Can-Can	1960	William Daniels, A.S.C.
The Candidate	1972	Victor Kemper, A.S.C.
Captain from Castille	1947	Arthur Arling, A.S.C.
		Charles Clarke, A.S.C.
Captains Courageous	1937	Harold Rosson, A.S.C.
The Carpetbaggers	1964	Joe MacDonald, A.S.C.
Casablanca	1942	*Arthur Edison, A.S.C.
Cat on a Hot Tin Roof	1958	*William Daniels, A.S.C.
Charade	1963	Charles Lang, A.S.C.
Chinatown	1974	*John Alonzo, A.S.C.
Cimarron	1930	*Edward Cronjager, A.S.C.
Citizen Kane	1941	*Gregg Toland, A.S.C.
Cleopatra	1934	**Victor Milner, A.S.C.
Cleopatra	1963	**Leon Shamroy, A.S.C.
Close Encounters of the Third Kind	1977	**Vilmos Zsigmond, A.S.C.
The Color Purple	1985	*Allen Daviau, A.S.C.
Come Back Little Sheba	1952	James Wong Howe, A.S.C.
Coming to America	1988	Woody, Omens, A.S.C.
A Connecticut Yankee	1949	Ray Rennahan, A.S.C.
The Corn is Green	1945	Sol Polito, A.S.C.
The Crowd	1928	Henry Sharp, A.S.C.
Cyrano De Bergerac	1950	Frank Planer, A.S.C.
Dark Passage	1947	Sid Hickox, A.S.C.
Day of the Locust	1975	*Conrad Hall, A.S.C.
Days of Heaven	1978	**Nestor Almendros, A.S.C.

Days of Wine and Roses	1962	Philip Lathrop, A.S.C.
Death of a Salesman	1951	*Frank Planer, A.S.C.
Decision Before Dawn	1951	Frank Planer, A.S.C.
The Deer Hunter	1978	*Vilmos Zsigmond, A.S.C.
The Defiant Ones	1957	**Sam Leavitt, A.S.C.
Desire Under the Elms	1958	*Daniel Fapp, A.S.C.
Destry Rides Again	1939	Hal Mohr, A.S.C.
Dial M for Murder	1954	Robert Burks, A.S.C.
Diary of Anne Frank	1959	**William C. Mellor, A.S.C.
Double Indemnity	1944	*John Seitz, A.S.C.
Dr. Jekyll and Mr. Hyde	1931	*Karl Struss, A.S.C.
Dr. Jekyll and Mr. Hyde	1941	*Joseph Ruttenberg, A.S.C.
Duel in the Sun	1946	Lee Garmes, A.S.C. Hal Rosson, A.S.C. Ray Rennahan, A.S.C.
Earthquake	1974	*Philip Lathrop, A.S.C.
East of Eden	1955	Ted McCord, A.S.C.
Easter Parade	1948	Harry Stradling, A.S.C.
The Egyptian	1954	*Leon Shamroy, A.S.C.
Elizabeth and Essex	1939	*Howard Greene, A.S.C.
Empire of the Sun	1987	*Allen Daviau, A.S.C.
The Empire Strikes Back	1980	Richard Edlund, A.S.C.
E.T.	1982	*Allen Daviau, A.S.C.
Executive Suite	1954	*George Folsey, A.S.C.
Exodus	1960	*Sam Leavitt, A.S.C.
The Exorcist	1973	*Owen Roizman, A.S.C.
Fanny and Alexander	1983	**Sven Nykvist, A.S.C.
A Farewell to Arms	1933	**Charles B. Lang, Jr. A.S.C.
Flower Drum Song	1961	*Russell Metty, A.S.C.
For Me and My Gal	1942	William Daniels, A.S.C.
For Whom the Bell Tolls	1943	*Ray Rennahan, A.S.C.
Forever Amber	1947	Leon Shamroy, A.S.C.
The Fountainhead	1949	Robert Burks, A.S.C.
The Four Seasons	1981	Victor Kemper, A.S.C.
The French Connection	1971	*Owen Roizman, A.S.C.
From Here to Eternity	1953	**Burnett Guffey, A.S.C.
Funny Girl	1968	*Harry Stradling, A.S.C.
Funny Lady	1974	*James Wong Howe, A.S.C.
Gaslight	1944	*Joseph Ruttenberg, A.S.C.
The General	1927	Dev Jennings, A.S.C.
Gentlemen's Agreement	1947	Arthur Miller, A.S.C.
Gigi	1958	**Joseph Ruttenberg, A.S.C.
The Glass Menagerie	1950	Robert Burks, A.S.C.
The Glen Miller Story	1954	William Daniels, A.S.C.
Going My Way	1944	*Lionel Lindon, A.S.C. *Ray Rennahan, A.S.C.

Gone with the Wind	1939	**Ernest Haller, A.S.C. **Ray Rennahan, A.S.C.
The Good Earth	1936	**Karl Freund, A.S.C.
The Graduate	1967	*Robert Surtees, A.S.C.
The Grapes of Wrath	1940	Gregg Toland, A.S.C.
The Great Dictator	1940	Carl Struss, A.S.C.
The Great Gatsby	1949	John Seitz, A.S.C.
The Great Waltz	1938	Joseph Ruttenberg, A.S.C.
The Greatest Show on Earth	1952	Peverell Marley, A.S.C.
The Greatest Story Ever Told	1965	*Loyal Griggs, A.S.C.
Green Dolphin Street	1947	*George Folsey, A.S.C.
Gunfight at the O.K. Corral	1957	Charles Lang, A.S.C.
Guys and Dolls	1955	*Harry Stradling, A.S.C.
Gypsy	1962	Harry Stradling, A.S.C.
Harlem Nights	1989	Woody Omens, A.S.C.
Harvey	1950	William Daniels, A.S.C.
A Hat Full of Rain	1957	Joe MacDonald, A.S.C.
Hawaii	1966	*Russell Harlan, A.S.C. *Linwood Dunn, A.S.C.
Heaven Can Wait	1943	*Edward Cronjager, A.S.C.
Heaven Can Wait	1978	*William Fraker, A.S.C.
Hello Dolly	1969	*Harry Stradling, A.S.C.
High Noon	1952	Floyd D. Crosby, A.S.C.
The Hindenburg	1975	*Robert Surtees, A.S.C.
Hombre	1967	James Wong Howe, A.S.C.
Hondo	1953	Robert Burks, A.S.C.
How Green was My Valley	1941	**Arthur Miller, A.S.C.
How the West was Won	1962	*William Daniels, A.S.C. *Milton Krasner, A.S.C. *Charles Lang, Jr., A.S.C. *Joseph LaShelle, A.S.C.
How to Marry a Millionaire	1953	Joe MacDonald, A.S.C.
HUD	1963	**James Wong Howe, A.S.C.
I'll Be Seeing You	1944	Gaetano Gaudio, A.S.C.
Inherit the Wind	1959	*Ernest Laszlo, A.S.C.
Inside Daisy Clover	1965	Charles Lang, A.S.C.
Intermezzo	1939	Gregg Toland, A.S.C.
Intolerance	1916	G.W. Bitzer, A.S.C., (Honorary)
It Happened One Night	1934	Joseph Walker, A.S.C.
It's A Wonderful Life	1946	Joe Biroc, A.S.C. Joseph Walker, A.S.C.
Jaws	1976	Wilmer Butler, A.S.C.
Jezebel	1938	*Ernest Haller, A.S.C.
Joan of Ark	1948	**Winton Hoch, A.S.C.
Johnnie Belinda	1947	*Ted McCord, A.S.C.
Judgment at Nuremberg	1961	*Ernest Laszlo, A.S.C.
Julius Caesar	1953	*Joseph Ruttenberg, A.S.C.

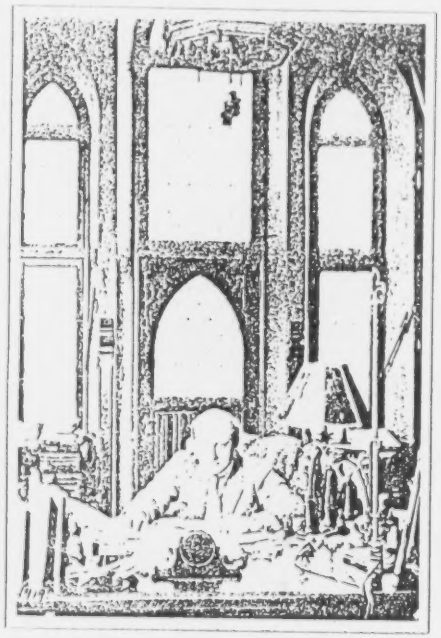
Keeper of the Flame	1942	William Daniels, A.S.C.
Key Largo	1948	Carl Freund, A.S.C.
Keys of the Kingdom	1945	*Arthur Miller, A.S.C.
The King and I	1956	*Leon Shamroy, A.S.C.
King Kong	1933	Linwood Dunn, A.S.C.
King Kong	1976	*Richard Kline, A.S.C.
King Solomon's Mines	1950	**Robert Surtees, A.S.C.
Kismet	1943	*Charles Rosher, A.S.C.
Kismet	1955	Joseph Ruttenberg, A.S.C.
Kramer v. Kramer	1979	*Nestor Almendros, A.S.C.
Lassie Come Home	1943	*Leonard Smith, A.S.C.
The Last Emperor	1987	**Vittorio Storaro, A.S.C.
Laura	1944	**Joseph LaShelle, A.S.C.
The Learning Tree	1969	Burnett Guffey, A.S.C.
Leave Her to heaven	1945	**Leon Shamroy, A.S.C.
Les Miserables	1935	*Gregg Toland, A.S.C.
A Letter to Three Wives	1948	Arthur Miller, A.S.C.
Lilies of the Field	1963	*Ernest Haller, A.S.C.
Limelight	1952	Carl Struss, A.S.C.
The Little Foxes	1941	Gregg Toland, A.S.C.
Little Women	1949	*Robert Plank, A.S.C.
Logan's Run	1976	*Ernest Laszlo, A.S.C.
Long Day's Journey into Night	1962	Borris Kaufman, A.S.C.
Lost Horizons	1937	Joseph Walker, A.S.C.
The Lost Weekend	1945	*John Seitz, A.S.C.
Love is a Many Splendored Thing	1955	*Leon Shamroy, A.S.C.
Madame Curie	1943	*Joseph Ruttenberg, A.S.C.
The Magnificent Ambersons	1942	*Stanley Cortez, A.S.C.
The Magnificent Seven	1960	Charles Lang, A.S.C.
The Maltese Falcon	1941	Arthur Edeson, A.S.C.
A Man Called Peter	1955	*Harold Lipstein, A.S.C.
The Man From Laramie	1955	Charles Lang, A.S.C.
The Man Who Came To Dinner	1941	Gaetano Gaudio, A.S.C.
The Manchurian Candidate	1962	Lionel Lindon, A.S.C.
Marjorie Morningstar	1958	Harry Stradling, A.S.C.
Marty	1955	*Joseph LaShelle, A.S.C.
Mary Poppins	1964	*Edward Colman, A.S.C.
Meet Me in St. Louis	1943	*George Folsey, A.S.C.
Midsummer Night's Dream	1935	**Hal Mohr, A.S.C.
Mildred Pierce	1945	*Ernest Haller, A.S.C.
Miracle on 34th Street	1947	Charles Clarke, A.S.C.
Mister Blandings Builds His Dreamhouse	1948	James Wong Howe, A.S.C.
Mister Roberts	1955	Winton Hoch, A.S.C.
Mister Smith Goes to Washington	1939	Joseph Walker, A.S.C.
Misty	1961	Lee Garmes, A.S.C.
Modern Times	1936	Rollie Totheroe, A.S.C.
Mrs. Miniver	1942	**Joseph Ruttenberg, A.S.C.
Munity on the Bounty	1962	*Robert Surtees, A.S.C.
The Music Man	1962	Robert Burks, A.S.C.
My Darling Clementine	1946	Joe MacDonald, A.S.C.

My Fair Lady	1964	**Harry Stradling, A.S.C.
My Friend Flicka	1956	Carl Struss, A.S.C.
The Naked City	1948	**William Daniels, A.S.C.
National Velvet	1944	*Leonard Smith, A.S.C.
Network	1976	*Owen Roizman, A.S.C.
Night and Day	1946	Peverell Marley, A.S.C.
Ninotchka	1939	William Daniels, A.S.C.
North by Northwest	1959	Robert Burks, A.S.C.
Northwest Passage	1940	*Sydney Wagner, A.S.C.
		*William V. Skall, A.S.C.
Now Voyager	1942	Sol Polito, A.S.C.
Of Human Bondage	1946	Peverell Marley, A.S.C.
Oklahoma	1955	*Robert Surtees, A.S.C.
The Old Man and the Sea	1958	*James Wong Howe, A.S.C.
On the Waterfront	1954	**Borris Kaufman, A.S.C.
One Flew Over the Cuckoo's Nest	1975	*Haskell Wexler, A.S.C.
Paint Your Wagon	1969	William Fraker, A.S.C.
The Pajama Game	1957	Harry Stradling, A.S.C.
Pal Joey	1957	Harold Lipstein, A.S.C.
The Paradine Case	1947	Lee Garmes, A.S.C.
Pat and Mike	1952	William Daniels, A.S.C.
Patton	1970	*Fred J. Koenekamp, A.S.C.
Phantom Of The Opera	1943	**Hal Mohr, A.S.C.
Philadelphia Story	1940	Joseph Ruttenberg, A.S.C.
Picnic	1955	James Wong Howe, A.S.C.
The Picture of Dorian Gray	1945	**Harry Stradling, A.S.C.
A Place in the Sun	1950	**William C. Mellor, A.S.C.
Places in the Heart	1986	Nestor Almendros, A.S.C.
Poltergeist	1982	Richard Edlund, A.S.C.
Porky and Bess	1959	*Leon Shamroy, A.S.C.
The Postman Always Rings Twice	1946	Sydney Wagner, A.S.C.
Pride and Prejudice	1940	Carl Freund, A.S.C.
The Pride and the Passion	1957	Frank Planer, A.S.C.
Psycho	1960	*John Russell, A.S.C.
The Quiet Man	1952	**Winton Hoch, A.S.C.
Quo Vadis	1951	*Robert Surtees, A.S.C.
Raiders of the Lost Ark	1981	Richard Edlund, A.S.C.
The Rainmaker	1956	Charles Lang, A.S.C.
Raintree County	1957	Robert Surtees, A.S.C.
Random Harvest	1942	Joseph Ruttenberg, A.S.C.
The Razor's Edge	1946	Arthur Miller, A.S.C.
Rear Window	1954	*Robert Burks, A.S.C.
Rebecca	1940	**George Barnes, A.S.C.
Rebel Without a Cause	1955	Ernest Haller, A.S.C.
Red River	1948	Russell Harlin, A.S.C.
Reds	1981	**Vittorio Storaro, A.S.C.

The Right Stuff	1983	*Caleb Deschanel, A.S.C.
Rio Bravo	1959	Russell Harlin, A.S.C.
The Robe	1953	*Leon Shamroy, A.S.C.
Roman Holiday	1953	*Frank Planer, A.S.C.
The Rose Tattoo	1955	**James Wong Howe, A.S.C.
Rosemary's Baby	1968	William Fraker, A.S.C.
Ruby Gentry	1952	Russell Harlin, A.S.C.
Sabrina	1954	*Charles Lang, A.S.C.
Same Time Next Year	1978	*Robert Surtees, A.S.C.
Samson and Delilah	1950	*George Barnes, A.S.C.
The Sand Pebbles	1966	*Joe MacDonald, A.S.C.
The Searcher's	1956	Winton Hoch, A.S.C.
The Secret Life of Walter Mitty	1947	Lee Garmes, A.S.C.
Separate Tables	1958	*Charles Lang, A.S.C.
Sergeant York	1941	*Sol Polito, A.S.C.
Seven Brides for Seven Brothers	1954	*George Folsey, A.S.C.
Shane	1953	**Loyal Griggs, A.S.C.
She Wore a Yellow Ribbon	1949	**Winton Hoch, A.S.C.
Ship of Fools	1965	**Ernest Laszlo, A.S.C.
Show Boat	1951	*Charles Rosher, A.S.C.
Since You Went Away	1943	*Stanley Cortez, A.S.C.
Singing in the Rain	1953	Harold Rosson, A.S.C.
Snow White and the Seven Dwarfs	1937	Ray Rennahan, A.S.C.
The Snows of Kilimanjaro	1952	*Leon Shamroy, A.S.C.
So Proudly We Hail	1943	*Charles Lang, A.S.C.
Some Like it Hot	1959	*Charles Lang, A.S.C.
Somebody Up There Likes Me	1956	**Joseph Ruttenberg, A.S.C.
The Song of Bernadette	1943	**Arthur Miller, A.S.C.
Sophie's Choice	1985	*Nestor Almendros, A.S.C.
Sound of Music	1965	*Ted McCord, A.S.C.
South Pacific	1958	*Leon Shamroy, A.S.C.
Spartacus	1960	**Russell Metty, A.S.C.
Spellbound	1945	*George Barnes, A.S.C.
The Spirit of St. Louis	1957	Robert Burks, A.S.C. Peverell Marley, A.S.C.
Splendor in the Grass	1961	Borris Kaufman, A.S.C.
A Star is Born	1976	*Robert Surtees, A.S.C.
Star Wars	1977	*Richard Edlund, A.S.C.
State Fair	1945	Leon Shamroy, A.S.C.
The Sting	1973	*Robert Surtees, A.S.C.
A Streetcar Named Desire	1951	*Harry Stradling, A.S.C.
Summer of '42	1971	*Robert Surtees, A.S.C.
The Sundowners	1950	Winton Hoch, A.S.C.
Sunrise	1927	**Karl Struss, A.S.C. **Charles Rosher, A.S.C.
Sunrise at Campo Bello	1960	Russell Harlin, A.S.C.
Sunset Boulevard	1950	*John Seitz, A.S.C.
Tabacco Road	1941	Arthur Miller, A.S.C.
The Ten Commandments	1956	*Peverell Marley, A.S.C. *Loyal Griggs, A.S.C.

Ten North Frederick	1958	Joe MacDonald, A.S.C.
That's Entertainment	1974	Ernest Laszlo, A.S.C.
		Russell Metty, A.S.C.
The Jazz Singer	1927	Hal Mohr, A.S.C.
The Way We Were	1973	*Harry Stradling, Jr., A.S.C.
Thirty Seconds Over Tokyo	1944	*Robert Surtees, A.S.C.
This is the Army	1943	Sol Polito, A.S.C.
Thoroughly Modern Millie	1967	Russell Metty, A.S.C.
Thousands Cheer	1943	*George Folsey, A.S.C.
Three Coins in the Fountain	1954	**Milton Krasner, A.S.C.
To Catch a Thief	1955	**Robert Burks, A.S.C.
To Kill a Mockingbird	1962	*Russell Harlin, A.S.C.
The Towering Inferno	1974	**Joe Biroc, A.S.C.
		**Fred Koenekamp A.S.C.
The Treasure of Sierra Madre	1948	Ted McCord, A.S.C.
A Tree Grows in Brooklyn	1945	Leon Shamroy, A.S.C.
True Grit	1969	Lucien Vallard, A.S.C.
Twelve Angry Men	1957	Borris Kaufman, A.S.C.
Twelve O'Clock High	1949	Leon Shamroy, A.S.C.
Two Years Before the Mast	1946	Ernest Laszlo, A.S.C.
The Unsinkable Molly Brown	1964	*Daniel Fapp, A.S.C.
Union Pacific	1939	*Farciot Edwards, A.S.C.
Vertigo	1958	Robert Burks, A.S.C.
Watch on the Rhine	1943	Hal Mohr, A.S.C.
Waterloo Bridge	1940	*Joseph Ruttenberg, A.S.C.
Western Union	1941	Edward Cronjager, A.S.C.
West Side Story	1961	**Daniel Fapp, A.S.C.
What Ever Happened to Baby Jane?	1962	*Ernest Haller, A.S.C.
White Christmas	1954	Loyal Griggs, A.S.C.
The White Cliffs of Dover	1943	*George Folsey, A.S.C.
Who Shot Liberty Valance	1961	William Clothier, A.S.C.
Who's Afraid of Virginia Woolf	1966	**Haskell Wexler, A.S.C.
The Wild One	1953	Hal Mohr, A.S.C.
Wilson	1944	**Leon Shamroy, A.S.C.
Winchester 73	1950	William Daniels, A.S.C.
Witness for the Prosecution	1957	Russell Harlin, A.S.C.
The Wizard of Oz	1939	Harold Rosson, A.S.C.
Written on the Wind	1956	Russell Metty, A.S.C.
Wuthering Heights	1939	**Gregg Toland, A.S.C.
Yankee Doodle Dandy	1942	James Wong Howe, A.S.C.
The Yearling	1946	**Arthur Arling, A.S.C.
		**Charles Rosher, A.S.C.
		**Leonard Smith, A.S.C.
The Young Philadelphians	1959	*Harry Stradling, A.S.C.

He Is A True Artist



Cecil B. DeMille in his studio office, California, 1919. The photograph was taken by Karl Struss, ASC. Adept as both photographer and cinematographer, long-time ASC member Struss filmed many of the DeMille epics during a long and distinguished career.

Amid the strange ingredients of Hollywood - a world typified by the human swarm and the artistic abstraction - there is a figure unknown to the chants of promoters and glorifiers. His hand has rarely held the scepter of public acclaim, his brow is not crowned with the envied olive leaf which so often settles upon the lordly producer and queens of beauty. This figure, a giant in his industry, is the cameraman - the sine qua non of a profession which often boasts that no one in its ranks is indispensable. No one, I say, save the cameraman.

I believe this is why:

He is the custodian of the heart of filmmaking as the writers are of its soul . . .

His tool is a box with a glass window, lifeless until he breathes into it his creative spirit and injects into its steel veins the plasma of his imagination . . .

The product of his camera, and therefore of his magic, means many things to many persons - fulfillment of an idea, an ambition . . . realization of dreams . . .

He is the judge who applies the laws of dramatic effect in complete coordination and fellowship with the director who interprets those laws . . .

Light, composition, treatment are his instruments of power, which he wields with intelligence and sensitiveness to bring to full bloom the meaning of his art . . .

His versatile management of intricate mechanism yields astonishing results in mood, emotion, dramatic effect . . .

A slanting shadow becomes a shattering portent of doom . . .

A lifeless chair instills the feeling of infinite sorrow . . .

A dead wall awakens a foreboding of plunging terror . . .

A flash of a man's face rises to the grandeur of drama, inspiring and ennobling . . .

Before his wizardry, wrinkles fade from the faces of Hollywood's ageless, imperishable beauties. . . chins take on lovely contours . . . years melt away . . .

Yes, the technique of the cameraman is the technique of artistic vivisection that lays bare the inner workings of our profession. If art can be said to be the expression of beauty in form, color, sound, shape or movement, then it must be said that same art is the art of the cameraman - expressed in the boundless reaches of his imagination.

For his patience and singleness of purpose in a most arduous work, he is eminently deserving of that which is justly said of few men: " He is a true artist."

— Cecil B. De Mille

1202

STATEMENT OF STANLEY CORTEZ, A.S.C.
PAST PRESIDENT OF THE AMERICAN SOCIETY OF CINEMATOGRAPHERS
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
OF THE JUDICIARY COMMITTEE
OF THE UNITED STATES SENATE

OCTOBER 24, 1989

I thank Chairman DeConcini and the Subcommittee for allowing me the privilege of inserting my remarks into the record of these hearings and for the kind words expressed about me by the Chairman and other witnesses.

I note that in his opening remarks, the Chairman revisited the issue of colorization in films photographed in black and white. Subsequently, this subject was discussed with great eloquence as well by George Stevens Jr.

When this matter first arose, prompting the need for past Congressional hearings, I was then the President of the American Society of Cinematographers.

We of the A.S.C. thought it ironic and, in fact, shocking that of all of the creators of film, we, the cinematographers, were not even consulted about our views on this issue.

After all, when a motion picture which was originally photographed in black and white is then colorized, it is not the actor's acting which is changed, nor the writer's writing, nor the composer's music, nor the editor's editing, nor the director's directing.

No. It is the cameraman's photography which is totally altered -- from what was an expressive work of intricately refined light and shadow to a totally different form, completely foreign to the cinematographer's vision of the story.

Not only was the cinematographer not brought into the prior debate before Congress, the cinematographer was not even included as a member of the National Film Preservation Board -- a stepchild conceived out of the colorization issue.

Representatives of the directors, writers and actors were included on the National Film Preservation Board. The critics, broadcasters, representatives from film departments at universities, and the producers were all represented on the Board. But not the cinematographer.

Whose work is principally being altered?

One would hope and trust that this glaring omission will be corrected by Congress in the future out of a simple sense of fairness and respect for the position of the cinematographer as a co-author in the creation of motion pictures.

I have photographed many feature films, including *The Magnificent Ambersons* and *Night of the Hunter*. The great majority of those films I photographed in black and white. I concur with the A.S.C.'s position voiced by our esteemed counsel, Mr. David Fleming, in that producers should have the right, as owners of films, to exploit them in whatever economic manner they have available to them, provided however, that any material

alterations they allow to be made should be clearly labeled to indicate that they were made to the original version and were done without the collaboration or consent of the cinematographer. This is absolutely necessary to protect our integrity and reputation as artists.

But as a long time craftsman in the Hollywood community, I still hold to my personal beliefs regarding the colorization process.

I know that perhaps some young people in America today scorn the impressionistic beauty of the classic black and white film -- the master achievement of Hollywood's Golden Era. But because some people do not appreciate the black and white picture does not mean all should be robbed of the joy of seeing a classic in its original beauty and splendor.

Each of us must have the right to feel that indescribable thrill of seeing classics uncut and uninterrupted -- the truth and the whole truth -- as we, the cinematographers created them.

When the colorization issue first arose, as President of the A.S.C. I wrote the following statement on behalf of cinematographers. It still is my personal philosophy regarding the matter:

> "I believe firmly in the preservation of the historical black and white film image . . . to tamper with it would be sacrilegious, no matter what method is used. This would be tantamount to altering a single note of

> Beethoven's 9th Symphony, which is unthinkable. I also believe transferring black and white to computerized color obviously does not have the fidelity inherent in the original . . . therefore it becomes detrimental to the creative efforts of the cinematographer who after all is responsible for the original photography and the images he alone creates . . . images, that can communicate with the senses and evoke human emotions through the phenomena of **LIGHT** . . .**COLOR** . . . and **SHADE.**"

Those then are my feelings, Mr. Chairman.

I am sure that the views of this veteran cameraman, who started in the silent era, are shared by many of the world's film fans who remember an age when the greatest magic that touched our everyday lives was what we saw in that darkened theatre on Main Street, U.S.A. up there on the silver screen -- direct from Hollywood.

May that magic never be lost to future generations, whether by electronic tinkering or by the indifference of those who never knew the joy, the thrill and magic of the Golden Era of Hollywood.

Senator DECONCINI. Mr. Fleming, thank you, and thank you, Mr. Cortez, for being with us. I must say, I appreciate anybody offering what you consider to be "middle ground." I'm sure others won't quite consider it middle, but it certainly is something, because the dilemma here from this Senator's point of view is that there is something that ought to be protected here, and yet the public use and viewing and demand and appetite, and the economics, and the fact that it works so well economically, is the struggle.

Mr. FLEMING. We quite agree.

Senator DECONCINI. Do we do what is really right and protect that artist all the way along so that the work is fostered and promoted, at the expense of perhaps the viewing public's desires, the market, and the economic benefits?

It's a tough question. I appreciate anybody offering anything, because I sure don't know what the heck to do.

Mr. Klein.

STATEMENT OF JONATHAN H. KLEIN, VICE PRESIDENT AND GENERAL MANAGER, WJZ-TV, CHANNEL 13, BALTIMORE, MD, REPRESENTING THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

Mr. KLEIN. Thank you, Mr. Chairman. My name is Jonathan Klein and I am the vice president and general manager of WJZ-TV, channel 13, in Baltimore, MD.

I appear before you today to give you the perspective of how moral rights would impact on the local broadcasters. I begin with the very firm conviction that the imposition of moral rights on broadcasters is a radical change that is not in the public interest.

I have this prepared statement, but I will waive it——

Senator DECONCINI. We will put it in the record.

Mr. KLEIN. I have been listening this morning to some things that have been said. I represent the "evil empire," free over-the-air commercial television. Mr. Forman said that he would have to have the right to OK any change in his film. That means that we could not buy Mr. Forman's film, or I would have to have his home phone number.

We buy packages of films. We buy packages of 20, 25, 30 films. We run them in different day parts. We run them in prime time; we run them all night; we run them on the weekends. Different day parts require different things. We are licensed to serve the public, and under this license we can perhaps run things all night that would not be acceptable at 10 o'clock in the morning on a Sunday. We have to be aware of that all the time.

Mr. Forman said that the network did a good job, and if they can do a good job, why can't everybody do a good job? We are licensed to Baltimore. What might be acceptable to the network we might not choose to run in Baltimore because we feel it would not be fulfilling our license and would not reflect what the community in Baltimore considers satisfactory. So that doesn't work.

We spent $6 million last year on buying syndicated product. That's one television station in Baltimore. The syndicated product

ranged from half-hour sitcoms to movies to made-for-television movies.

We were talking about this with the NAB last night. I just don't see—unless I had every director's home phone number, every cinematographer's home phone number——

Senator DECONCINI. Wait a minute, Mr. Klein. I agree that nobody would expect that to happen. If in fact there was some right of Mr. Forman—whoever you buy those films from, you buy them from some organization that does this, right?

Mr. KLEIN. Yes.

Senator DECONCINI. And they would have to have gone to Mr. Forman and gotten his approval to change it so that they could sell it to you. Isn't that really what we are talking about?

So it might cost you more, because that organization might have to spend some time and pay Mr. Forman something to modify his film so that they could present it to you for television viewing. You would look at it and say, "Well, Baltimore doesn't want that one." So you toss it out and you look at something else; or you say, "Yes, it's done, and what is it going to cost me?" "Well, it's going to cost you X percentage more because we had to do it."

Isn't that really what you're talking about? You don't want to pay for someone getting hold of Mr. Forman and trying to get him to negotiate so that you could get his film. Isn't that really what we're talking about? And there's nothing wrong with that.

Mr. KLEIN. Sure, part of it is money the economics that whatever you buy has to make sense, but the other part of it is the flexibility when you buy things, that it can suit different needs at different times. What Mr. Forman would agree to would be something that he would agree to that he would assume would fit all of this country. What I worry about is what the standards of Baltimore are. We plan to run "Blazing Saddles" this Thursday. We're going to cover 2 hours of network and run "Blazing Saddles." We got an edited version from the syndicator.

Now, the edited version was interesting. I don't know if you've seen "Blazing Saddles" a long time ago, but there are a lot of racial and ethnic references in it. So we decided to have a screening of it before we run it.

Now, what they did is, they left all the racial and ethnic jokes in, but around the campfire there is a very funny scene—it's a flatulence scene; they eat a lot of beans, and there is a lot of flatulence. So what the film syndicator did, they cut out the flatulence scene but they left in all the ethnic and racial jokes.

Those are their standards. I looked at it and I had to say, "OK, is Baltimore not ready to accept flatulence but ready to accept racial and ethnic jokes?" And my decision was probably yes, so we are running the film. [Laughter.]

Senator DECONCINI. What difference would it make, Mr. Klein, if whoever directed that movie——

Mr. KLEIN. Mel Brooks.

Senator DECONCINI [continuing]. If he made that decision and left it in, and then you still either show it or you don't? And if you don't like it, you tell the syndicator, "Hey, we don't like these, and you better get stuff that we have more choice on." So they go back to the director and renegotiate, maybe.

Mr. KLEIN. Again, it is time consuming. They make a decision on what they think is the right thing for the country by their standards, but it doesn't necessarily meet Baltimore's standards. We would end up running and buying less and less films and get out of the film business.

Senator DECONCINI. Let me ask you this fundamental question.

Mr. KLEIN. Sure.

Senator DECONCINI. Do you regard Mr. Forman and other directors as artists?

Mr. KLEIN. Yes, I do.

Senator DECONCINI. Are they artists, like painters?

Mr. KLEIN. They are artists.

Senator DECONCINI. Should they have something to say about the ultimate use of their product?

Mr. KLEIN. I think when they negotiate the services for whoever they are doing it for——

Senator DECONCINI. It should be done under collective bargaining?

Mr. KLEIN. Absolutely.

Senator DECONCINI. And it should not be mandatory?

Mr. KLEIN. Absolutely. And they could very well choose, as Woody Allen or Warren Beatty did, that "we don't want it on television; it is wrong for artistic work."

Senator DECONCINI. So then the answer to the young, new director is, "Wait until you are Woody Allen so that you can get that protection." In essence, your reputation is going to help you economically to be able to be in a position to bargain for it.

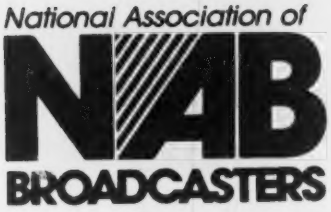
Mr. KLEIN. That's the way it works. Most ballplayers' first contract is not as good as the contract 5 or 6 years later.

Senator DECONCINI. But ballplayers are not artists—or do you think they are?

Mr. KLEIN. Oh, I think they are artists. [Laughter.]

I would find it harder to play baseball than to direct a film.

[The prepared statement of Mr. Klein follows:]



WRITTEN TESTIMONY

FOR

JONATHAN KLEIN, VICE PRESIDENT/GENERAL MANAGER
WJZ-TV, BALTIMORE

BEFORE

PATENTS, COPYRIGHTS AND TRADEMARKS SUBCOMMITTEE

ON

COPYRIGHT MORAL RIGHTS IN FILMS
TELEVISION, AND OTHER PERFORMING ARTS

OCTOBER 24, 1989

Thank you, Mr. Chairman. My name is Jonathan Klein and I am the Vice President and General Manager of WJZ-TV, Channel 13 of Baltimore, Maryland. I am here today representing both the National Association of Broadcasters (NAB) and the Association of Independent Television Stations, Inc. (INTV). I appreciate the opportunity to discuss with the Subcommittee the concerns of local broadcasters as you consider fundamental changes in the Copyright Act by inclusion of a system of "moral rights".

I am aware that copyright matters are often left to lawyers to debate the fine nuances of differing points of law. I am not an attorney and I appear before you today to give you the perspective of how moral rights would impact on the local broadcaster. I begin with the very firm conviction that imposition of moral rights on broadcasters is a radical change that is not in the public interest.

Broadcasters are licensed to serve the public interest in thousands of communities nationwide. We provide entertainment, local news, weather, information on disasters and tragedies, and, through contractual relationships we bring national and international news to our local residents. Our ability to fulfill our responsibilities to our local communities and our rights as First Amendment speakers would be dramatically handicapped by the use of "aesthetic vetoes."

I am sure that there will be many on the other side of this issue who will seek Congressional support for a legislated moral rights provision by raising the issue of preservation of artistic creativity. Broadcasters, however, have a different concern. First, broadcasters view the imposition of moral rights as directly in conflict with our ability and responsibility to edit programming we provide to local communities. Second, it will be an unnecessary and expensive "add-on" to the already costly process of bringing programming to millions of television broadcast viewers.

BROADCASTERS' CONCERNS WITH MORAL RIGHTS

NAB and INTV strongly support the view provided to the subcommittee by Michael Klipper, counsel to the Committee for America's Copyright Community (CACC), at your hearing on September 20, 1989. In that testimony, Mr. Klipper traced the recent history of moral rights in the legislative process. In the debate over U. S. ratification of the Berne Convention, Congress identified state and federal law as satisfying our obligations under Berne in this area. Last year Congress correctly struck the balance between the recourse available to a party asserting a "moral right" type of claim and preservation of a copyright system that works effectively for all affected parties.

In this country, copyright owners enjoy a financial

incentive to produce and to provide the public with the "fruits of their labors." The Constitutionally-mandated authority in copyright is designed to promote the creation and dissemination of intellectual property for the benefit of the larger population.[1] In balancing the public and private interests, the Supreme Court stated:

> "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims on the public interest. Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the arts. (emphasis added)."[2]

The Supreme Court reiterated its support for the public interest prevailing over private motivations in the "Sony" case. There the court noted: "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration . . . . The sole interest of the United States and the primary object of conferring the monopoly lie in the general benefits derived by the public from the labors of authors"[3]

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[1] U. S. Constitution, art. I, sec. 8, cl. 8.

[2] Twentieth Century Music Corp. V. Aiken, 422 U. S. 151, 156 (1974).

[3] Sony Corp., v. Universal City Studios, Inc., 464 U. S. 417, at 429, (1984).

In contrast, it appears that moral rights do not exist for the good of the public, but rather for the benefit of the author, who in this case is a film director. The Berne Convention itself spells out the primacy of the author:

> "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. (emphasis added)[4]

I would respectfully suggest that much of your examination of this issue should focus on the question of whether the public interest will be well served by the Congress acting to impose a regime of moral rights. The NAB and INTV submit that it would not. The copyright system today is in good order, it protects intellectual property in this country, creates incentives for creation and dissemination of this intellectual property and has led to one of the few bright spots in our international trade picture. The burden on those who would so radically alter our highly successful copyright system is a heavy one indeed.

There can be little question that legislation conferring moral rights would represent a retroactive attempt to secure a

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[4] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886 (Paris Revision 1971) Art. 6 bis.

benefit which was not part of the original bargain or contract. Such a proposal would create a non-economic right which could have the effect of diminishing or strangling the flow of music, art and literature to the public. Today much of the discussion in this area is either an issue solvable through labor-management negotiation, or by contract between individual parties. The degree of control a director or a screenwriter may enjoy in the post production phase of a film or other audio-visual work can and should be settled in the marketplace and not by Congressional action.

In part, the issue focuses on films that are of older vintage. People who support the imposition of moral rights on others seek to secure a property right for contributions made at the time of production. It is reasonable to assume that these same people were suitably compensated at that time. They possess no further property right today, yet seek to elevate a non-existent claim over other contributors to the same work.

Further, should moral rights be granted to those involved in bringing to vision their interpretation of the written word, what will prevent the writer from exercising moral rights over the creative interpretations of the directors, cinematographers and actors? If the limitations embodied in Article 1, Section 8 of the Constitution and the federal copyright law are not maintained, then the value of the copyright itself would become illusory in the wake

of a moral rights challenge.

At a minimum there will be extraordinary impact on the ability of broadcasters to make business and legal judgments that are required on a daily basis and which are so crucial to the delivery of programming. Moreover, moral rights could have a potentially devastating financial impact as well. Television broadcasters spend billions of dollars every year to purchase the rights to programs. It is estimated that about 10% of a movie's viewers see it at a movie theater. Fully 70% of the viewers of a movie see it on broadcast television. Moral rights, as discussed over the last several years, would require the broadcast licensee to negotiate with another party -- the director or screenwriter with whom he has no pre-existing contractual relationship -- to secure the necessary bundle of rights to air programs. Further, this party could retain the right to approve or disapprove of actions taken by the broadcaster which are required under law, regulation, community standards or economic necessity.

BROADCAST EDITORIAL TECHNIQUES

In order to prepare a theatrically released motion picture for television broadcast there are several customary editorial techniques which are employed. These techniques are used for economic, legal, ethical and/or technical reasons. All of these techniques are essential to deliver programming to the

public. In addition, remember that television broadcasting is a mass medium. Our transmissions and our industry are shaped by the fact that we exist to provide a free, universal service. In reviewing the editorial practices of the broadcast industry, these two points will become clearer.

Commercial Insertions:

It is essential that broadcasters be permitted to edit movies or other audio-visual works for commercial insertions. As I mentioned, television broadcasters provide a free service to our viewers. Our only means of raising revenue is by the selling of air time. Without the ability to insert commercials at appropriate breaks in a motion picture presentation, it is unlikely that we could raise enough revenue to buy the rights to air the movie in the first place. The subcommittee should be aware, however, that "commercial insertions" captures more than just the selling of commercials. I would include under this general heading the insertion of public service announcements (PSA's), station identifications, station and network promotions and news and weather updates. Let me add that some of these activities are functions that stations must perform as licensees under the Communications Act of 1934. Commercial insertions obviously affect the time schedules that all television stations follow.

Editing to meet time constraints:

There has been discussion of the need to edit motion

pictures to fit pre-existing television time schedules. This editing may take the form of editing out film footage, or time compression or expansion.[5] The importance of editing to meet express time schedules cannot be overstated. The ability to provide a wide variety of programming, including local, national and international news, sporting events and other forms of entertainment programming, requires the local broadcaster to start and end programming at precise times. A station, such as my own, which makes use of network news and sporting events must be able to provide that program to our local audience at the start of the network feed.

Editing for content:

Broadcasters also need to edit for content. As holders of licenses issued by the Federal Communications Commission (FCC), television broadcasters are legally responsible for virtually all material transmitted to the viewing audience. The FCC is generally empowered to impose administrative sanctions on broadcasters based upon their transmissions,[6] as well as specifically directed to impose civil sanctions for violations of the criminal law prohibiting obscene, indecent or profane language "uttered" by

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[5] Time compression or expansion is sometimes referred to as "lexiconning." As used in this statement, time compression will encompass both the compression or expansion of a film to fit a broadcast time schedule.

[6] 47 U. S. C. 312(a)(6), 503(b)(1)(D) (1982).

radio communications.[7] Imagine the problem which would confront the broadcaster if Congress legislated a moral rights proposal limiting his discretion to edit out material which was overly violent, profane, indecent or obscene. The broadcaster would have the unpleasant choice of either committing a violation of the Copyright Act or a possible violation of the Communications Act and the criminal code.

A moral rights amendment to the copyright law would impose an unnecessary and overly burdensome requirement on broadcasters. In the end, the broadcaster must retain the editorial discretion which permits him to fulfill his responsibility as a licensee.

Panning and Scanning:

At times it may be necessary to make technical adjustments to theatrically released motion pictures for broadcast dissemination, such as adjusting the film so that it fits within the smaller confines of the television screen. Today, this adjustment is achieved by one of two means, letter-boxing or panning and scanning.

Letter-boxing is a technique which retains the aspect ratio of motion pictures (the relationship between the height and

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[7] 18 U. S. C. 1464 (1982).

width of the projected image). The effect of this technique is to shrink the picture. The television viewer sees the movie with thick black borders above and below the picture.

Far more commonly used is panning and scanning, where the viewer receives a full screen of video information without the presence of the thick, distracting borders. Panning and scanning adjusts the movie from the widescreen image seen in the theater to the narrower image employed in broadcast television.

The disagreement is between individuals who prefer one technique over the other. The broadcaster, providing programs in nis/her local community, should have the stronger understanding of what programming would be attractive in that community. One assumes it is unlikely that a popular motion picture will attract a large broadcast audience if the viewers sense they are getting less than a "full screen's worth of picture." There appears to be little reason for Congress to legislate on which technique is preferable. Rather, this question can best be settled by the viewing public.

It is interesting to note that a number of directors deplore the use of panning and scanning, yet they recognize the commercial value of broadcast release of motion pictures.[8] In

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[8] ID. at 44, n.72.

essence, they seek to inhibit or control the editing of a motion picture, yet still be assured of the same financial rewards. Panning and scanning of motion pictures has been an accepted editorial technique for over 25 years. I am unaware of any rejection of this process by the general public.

Colorization:

Finally, there is a continuous and vigorous debate concerning colorization of motion pictures. To the best of my knowledge, only a few broadcast stations make use of colorized movies. However, as a matter of policy, we view the right to colorize a motion picture as we view other technologies or editorial techniques that enable films to be available to the public. While I could not pick a winner in the ongoing debate, it seems to me that those who argue that colorization has exposed many of the most popular motion pictures of the past to a new, younger audience have as much validity in their view as those who view colorization as an improper action. It may well be that a colorized movie does a better job of serving the goal of "brcad public availability" I discussed earlier.

CONCLUSION

Mr. Chairman, again let me express my appreciation to you and the subcommittee for holding this very important hearing.

NAB and INTV strongly opposes the imposition of moral rights on our system of copyright protections. Our system already fulfills the purposes of protecting a creator's work, providing financial benefit for that work, and creating incentives for the dissemination of these works to the public. Our strongly held view is that a moral rights requirement would not enhance our current system. Instead, it would do our copyright system significant injury. Thank you again, and I look forward to your questions.

Senator DECONCINI. Thank you, Mr. Klein.
Ms. DeMasse.

STATEMENT OF JAN DeMASSE, PRESIDENT, VIDEO PLACE, REPRESENTING THE VIDEO SOFTWARE DEALERS ASSOCIATION, ACCOMPANIED BY BERT WIDES, COUNSEL, LAW FIRM OF ARENT, FOX

Ms. DEMASSE. Thank you, Mr. Chairman. I am Jan DeMasse, president of Video Place, Exeter, NH. I welcome this opportunity to present the position of VSDA on the issue of so-called moral rights in regard to the motion picture industry, particularly the processing of films for viewing on television screens in such formats as prerecorded video cassettes, broadcast, and cable.

Our principal focus today is the issue of transferring films to video cassettes and the related technological adjustments, such as panning and scanning. As other witnesses have explained in more detail, panning and scanning is the principal technique used to adapt films shown on theater screens so they also can be enjoyed on standard TV screens.

Our basic point is that Congress should consider the full range of public interests involved in this complex issue. It is crucial that you keep in mind the public interests ultimately to be served. They include the concerns of thousands of small businesses who provide motion pictures in video cassette form to the public, and even more importantly, the preferences of our customers, millions of Americans who look to home video for affordable family entertainment.

It is not clear precisely how any particular legislative scheme would create artists' moral rights in the motion picture industry, but the inevitable result of such schemes would be to increase the leverage that directors and screenwriters possess in their bargaining with motion picture studios. The added leverage would result from an artist's moral right to veto any exhibition of his work in a form that he claimed would harm the artistic integrity of the work. Such a proposal is unwarranted and unwise. Video dealers and their customers would be harmed in several ways.

First, writers or directors could insist that their films be letter boxed rather than panned and scanned. It is the experience of our member dealers that with few exceptions, the public finds letter boxing a distracting and annoying interference with their enjoyment of the film. After four decades of television viewing, they are accustomed to a fully filled screen, not one cut off at the top and bottom.

In addition, letter boxing substantially diminishes picture resolution on the TV because the picture is squeezed into a smaller space. Details are obscured. Most of our customers find the smaller and poorly detailed letter box picture far less satisfactory. This customer dissatisfaction with the letter boxing has been the general experience of the dealers in our area.

Let me give you one example from my personal experience. When our store has rented a film that was letter boxed, a customer returned to claim that the cassette was defective because they couldn't see the whole picture. Other dealers report similar responses.

Second, writers and directors could prevent conversion of films to video cassette in any format. Directors or writers could claim that both letter boxing and planning and scanning processes unacceptably adulterate the artistic integrity of their films. Their veto power would totally deny home video access to a number of important films.

Third, writers and directors who are not opposed in principle to panning and scanning would nevertheless use the economic leverage of their moral rights to increase their compensation in exchange for permitting their films to be processed for the video cassette format. The studios would pass on that increased cost of production in the form of higher prices charged to distributors and, in turn, video retailers. We, the retailers, would have to absorb that increased cost, although let me assure you, Mr. Chairman, that our margin of profit is far smaller than that of screenwriters or directors—or we would have to pass it on to our customers.

Fourth, moral rights could lead to very substantial delays in the release date of video cassettes. That is the most likely outcome for many films. Almost 5 years passed before "E.T." was released on video. Because of such negotiations, not every film has the remarkable longevity of that picture. For many films, the delay caused by extended negotiations to obtain artistic approval of home video versions could significantly reduce the market demand for those video cassettes. We know from experience that more recently publicized films tend to displace consumer interest in older films, making them more difficult to market.

Although much of the preliminary discussion has focused on the concept of veto power granted to the holder of moral rights, some approaches envision a labeling scheme. Under such labeling requirements, video cassettes would have to disclose that changes had been made without the approval of key participants in the creation of the original work. At first blush this might seem a less drastic, more modest option, but here again VSDA urges you not to focus solely on the relationships between the studios and their screenwriters and directors. You should carefully review and keep in mind the realities of retailing and the significant burdens such a scheme could place on our members and their customers.

My final point is this. The existing American system for distributing films through theaters, home video cassettes, television, and cable broadcasts has been an unparalleled success in making these films widely accessible to the public. It is the envy of the world. In light of the many other pressing matters before the Judiciary Committee and the maze of issues which legislating moral rights entails, we strongly recommend that you follow the old adage, "if it ain't broke, don't fix it." The system is not broken. New legislation is not needed.

[The prepared statement of Ms. DeMasse follows:]

Statement of

Jan DeMasse, on Behalf of
The Video Software Dealers Association

At the Copyright Moral Rights Hearing

Before the
Patents, Copyrights and Trademarks Subcommittee
of the Senate Judiciary Committee

on
Copyright Moral Rights in Films

October 24, 1989

Thank you, Mr. Chairman. I am Jan DeMasse, President of Video Place, in Exeter, New Hampshire. I am a member of the National Board of Directors of the Video Software Dealers Association, or "VSDA." VSDA is the national trade association of home video distributors and retailers, and represents about 20,000 of the roughly 30,000 retail home video stores across the country. I am particularly pleased to appear before the Subcommittee with two Members from New England, because I am also past president of the New England Regional Chapter of VSDA.

I welcome this opportunity to present the position of VSDA on the issue of so-called "moral rights" in regard to the motion picture industry, particularly the processing of films for viewing on television screens in such formats as prerecorded videocassettes, broadcasts and cable. The phrase, "moral rights," is the standard form of reference in European legal doctrine to a creative artist's right to protect the artistic integrity and reputation of his work.

Our basic point is that Congress should consider the full range of public interests involved in this complex issue. Congress should not narrowly, and artificially, view the matter as merely a dispute between film producers and directors. In fact, we strongly agree with Chairman Kastenmeier of your counterpart House subcommittee, who said last March that proponents of legislation not only have the burden of proving that such a change was justified, but also must show that any legislation is consistent with the interests of the film distribution system and the viewing public.

I will not dwell on the specific issue of colorization -- which VSDA addressed extensively during deliberations on the Interior Appropriation bill in the last Congress -- except to reiterate that a substantial majority of VSDA members strongly support the right of the customers to see colorized versions of older films. This will also create the opportunity for new generations of viewers to enjoy great film classics they might otherwise pass by.

Our principal focus today is the issue of transferring films to videocassettes and the related technological adjustments such as panning and scanning. As other witnesses have explained in more detail, panning and scanning is the principal technique used to adapt films shown on theatre screens so they also can be enjoyed on standard TV screens. Congressional establishment of new moral rights with

regard to such mechanical processes would raise a number of difficult threshold issues.

First, the Copyright Office report, "Technological Alterations to Motion Pictures," itself notes that any effort to retroactively create such rights regarding pictures already made would raise very serious questions of constitutionality -- and fundamental fairness. It would be changing the law after the players in the motion picture industry had committed resources to making a film on the basis of the copyright rules of the game operative at that time.

Second, there is the fundamental question of why Congress should intervene at all in the intricate web of labor management negotiations, rights of consultation and collective bargaining agreements that have been painstakingly developed between the motion picture studios and the writers and directors. That complex relationship is unique to the United States; it precludes simplistic comparisons to "moral rights" regimes in other countries.

These and many additional issues will be explored by other witnesses. As I noted at the outset, VSDA's main concern is that the Subcommittee not view the issue too narrowly, as merely a battle between screenwriters and directors, on the one hand, and studios, on the other. It is crucial that you keep in mind the "public interests" ultimately to be served. They include the concerns of thousands of small businesses, who provide motion pictures in videocassette form to the public and, even more importantly, the preferences of our customers -- millions of Americans, who look to home video for affordable family entertainment.

Veto Over Technology

It is not clear precisely how any particular legislative scheme would create "artist's moral rights" in the motion picture industry. But the inevitable result of such schemes would be to increase the leverage that directors and screenwriters possess in their bargaining with motion picture studios. The added leverage would result from an "artist's moral right" to veto any exhibition of his work in a form that he claimed would harm the "artistic integrity" of the work.

Such a proposal is unwarranted and unwise. Video dealers and their customers would be harmed, in several ways:

(1) Writers or directors could insist that their films be letter-boxed, rather than panned and scanned. So-called "letter-boxing" is the technique used in order to present a film on square TV screens, but within a viewing area of approximately the same height-to-width ratio as a theatre screen. The entire picture is compressed into a smaller rectangle, with black bands filling in the void that results at the top and bottom of the screen. It is the experience of our member dealers that, with few exceptions, the public finds "letter-boxing" a distracting and annoying interference with their enjoyment of the film. After four decades of television viewing, they are accustomed to a fully filled screen, not one cut off at the top and bottom.

In addition, letter-boxing substantially diminishes picture resolution on the TV because the picture is squashed into a smaller space. Details are obscured. Most

of our customers find the smaller and poorly detailed letter-boxed picture far less satisfactory. This customer dissatisfaction with the letter-boxing has been the general experience of the dealers in our area. Let me give you one example from my personal experience. When our store has rented films that were letter-boxed, customers have returned to claim that their cassette was defective because they "couldn't see the whole picture." Other dealers report similar responses.

(2) Writers and directors could prevent conversion of films to videocassette in any format. Directors or writers could claim that both letter-boxing and panning and scanning processes unacceptably adulterate the "artistic integrity" of their films. Their veto power would totally deny home video access to a number of important films.

(3) Writers and directors not opposed in principle to panning and scanning would nevertheless use the economic leverage of their "moral rights" to increase their compensation, in exchange for permitting their films to be processed for the videocassette format. The studios would pass on that increased cost of production in the form of higher prices charged to distributors and, in turn, video retailers. We-- the retailers -- would have to absorb that increased cost (although our margin of profit is far smaller than those of screenwriters and directors) or pass it on to our customers. Though some directors have claimed they would never use any new "moral rights" for financial bargaining, their new leverage would inevitably affect the outcome of commercial negotiations.

(4) "Moral rights" could lead to very substantial delays in the release date of videocassettes. That is the most likely outcome for many films. Almost five years passed before "E.T." was released on video because of such negotiations; not every film has the remarkable longevity of that picture. For many films, the delay caused by extended negotiations to obtain artistic approval of home video versions could significantly reduce the market demand for those videocassettes. We know from experience that more recently publicized films tend to displace consumer interest in older films, making them more difficult to market.

(5) This threat of uncertainty and delay is particularly dangerous because of the veritable Pandora's Box opened by any scheme for moral rights in the motion picture industry. The Copyright Office report emphasizes that, if Congress considers a moral rights regime, there is no principled basis on which the status of a film "creator" or "artist" could be limited merely to screenwriters and directors. Many other participants in the creative process could claim eligibility, from studio executives and actors to choreographers, musical composers, and the author of an original underlying work adapted for the screen, to name but a few. All would have a substantial claim to participate. Consider, for example, a large, elaborate musical film based on a Broadway play or book; negotiations over the application of technological processes would become an unmanageable mob, rather than the simple scheme portrayed by "moral rights" proponents.

(6) In addition to harming our businesses and our customers directly by restricting or delaying access to particular films, a new "moral rights" scheme also would be harmful in the aggregate by reducing the total number of motion pictures which studios and other investors are able to underwrite. Your subcommittee is familiar with the fact that a number of very successful movies produce sufficient

revenues from theatre runs and other markets, including home video, to help sustain the production of many other, less successful, films. As the problems noted above reduce the post-theatre markets for films, studios will be forced to produce fewer films overall. That, in turn, will mean less inventory for our members to offer, and fewer films for the public to rent.

Labeling Proposals

Although much of the preliminary discussion has focused on the concept of a veto power granted to the holder of "moral rights," some approaches envision a labeling scheme. Under such labeling requirements, videocassettes would have to disclose that changes had been made without the approval of key participants in the creation of the original work. At first blush, this might seem a less drastic, more modest option; but here again, VSDA urges you not to focus solely on relationships between the studios and their screenwriters and directors. You should carefully review and keep in mind the realities of retailing, and the significant burdens such a scheme could place on our members and their customers. Video dealers would not be in a position to know the nature of any changes made or how they would relate to some official standard of alteration that might trigger prescribed disclosure or other alleged remedial action. Video dealers would be innocent bystanders who should not be penalized with regard to disputes about which they had no direct knowledge and over which they had no control.

Moreover, the Interior Appropriations bill consideration last year taught us an important lesson. In an effort to meet all of the problems raised by moral rights legislation, proposals that start out appealingly simple are likely to end up so complicated as to make Rube Goldberg weep with envy. The complexity of these proposed "solutions" can ultimately create more serious problems than those they were designed to remedy.

Your hearing addresses the impact of new technologies on "public access" to the original version of audiovisual works. You must also address the question of what impact legislative proposals might have on the public's ability to see these works at all -- in any format -- because of the problems that legislation would create for video retailers. For example, one bill introduced in the other body in the last Congress would have imposed a duty on retailers to contact designated categories of artists involved in a film's creation to make sure that, if they objected to the videocassette format, their objection was adequately reflected in a "warning label" for the public. Such schemes, because of their burdensome regulation and their cost of compliance, could impel retailers simply not to carry these films.

In fact, once we move beyond colorization and talk about technologies that apply to most films put into a video format, such as panning and scanning, you should ask yourselves whether the "public interest" really requires further "disclosure." Americans have been seeing movies on television for decades, and home videos for many years. Is it really necessary to explain to them that when they see a film on a TV screen, it is not the same experience as seeing it on a large screen movie theatre? You should credit the American consumer with more intelligence than that.

In conclusion, let me make two general observations. First, as you know, the motto of the home video industry has long been "freedom of choice" for American consumers -- freedom to rent or purchase the films they wish to see, when they want to see them. If consumers object to the format producers choose for videocassette, they will let us know loud and clear, and we will tell the film production industry. But the fact is that most of our customers do not particularly enjoy letter-boxed films on their TV screens, which are so much smaller than those in movie theatres.

We have seen claims that very large wall TV screens and HDTV will soon be available and will allegedly diminish this problem, both because of their size and because they will more closely approximate the shape of theatre screens. We urge the Subcommittee to remember that it will be many years before such luxuries become a reality for the average American family trying to find affordable entertainment on a tight budget. Remember, too, that there are still millions of television screens being viewed in American homes that are smaller than the size TV some of you may have in your own house. Letter-boxing is a particularly annoying distraction and distortion of picture resolution for such smaller sets.

My final point is this. The existing American system for distributing films through theatres, home videocassettes, television and cable broadcasts has been an unparalleled success in making these films widely accessible to the public. It is the envy of the world. Normal labor management relations provide an ample arena for directors, screenwriters and other participants in movie making to work out their relationships and relative rights of "artistic control" with the studios. Especially in light of the many other pressing matters before the Judiciary Committee, and the maze of issues which legislating "moral rights" entails, we strongly recommend that you follow the old adage, "if it ain't broke, don't fix it." The system is not broken. New Legislation is not needed.

Senator DECONCINI. Thank you, Ms. DeMasse.

What is the great burden of having a label on it, if there was a label?

Bert, do you want to respond to that?

Mr. WIDES. Mr. Chairman, let me speak to that, if I may. I am Bert Wides of Arent, Fox, counsel for the Video Dealers Association.

That is a reference to the fact that some of the labeling schemes, as you may recall, initially proposed in regard to the colorization provisions in the Interior appropriations bill, would have placed liability on the dealers for selling or renting films that were improperly labeled, even though they would have no way of knowing——

Senator DECONCINI. I'm not talking about that, Mr. Wides. What if there was a label similar to the one that you see now from the FBI about duplication of the film? What if there were a label like that? Is that a burden on the retailers that would be of any significance? I'm not sure that's an answer either, but I'm just asking that question.

Mr. WIDES. If there is no responsibility it may not be, although I think if Congress totes up all the variety of labels that have to be put on, particularly at the beginning of a film, initial statements about FBI warnings and copyright warnings and pirating warnings—now if you had long statements listing a long list of 20 or 30 participants, it might begin to be somewhat distracting for the consumer. But in terms of the dealer, if they were left out of any responsibility, it would not necessarily be a burden.

Senator DECONCINI. Do they have any responsibility under the FBI warning?

Mr. WIDES. I'm saying that for the dealer it would not be a problem unless it affected the overall consumer demand. Some of the schemes proposed last year for labeling would have.

Senator DECONCINI. I'm not suggesting that's the answer; I was just surprised by that statement. Thank you very much.

Mr. MAYER. Senator, I could comment on that. We have been labeling in accordance, and it has not been a burden. The only problem would be if it got to the point where there is no more room. When you have to put the credits and so forth, there is a problem, but we are happy to do it.

Senator DECONCINI. I'm glad you brought that up because I think that's important.

Mr. FLEMING. Senator, on behalf of cinematographers, we feel that labeling is simply telling the truth. It is very important to the creators that people realize the fact that the original version is different from what they're seeing.

Senator DECONCINI. Well, it seems to me it is too, even though I suspect that for a great deal of the public it would become routine. Nobody reads the FBI thing any more, including myself. But if you like black and white and you were seeing the colorization, you would like to know. I think I'd like to know. I might want to know that Mr. Cortez was the cinematographer on that thing, and I might not care, but there doesn't seem to be any public damage to tell the people that.

I want to thank the panel very much for your expert testimony. I do have some questions, if you would entertain me submitting

them to you. It would help us in the record here to have some of your answers, particularly you, Mr. Klein, Mr. Mayer, and others. Thank you very much.

[Questions asked by Senators, and the answers thereto, subsequently submitted by panel members, follow:]

TURNER ENTERTAINMENT CO.
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ROGER L. MAYER
President and Chief Operating Officer
(213) 558-7301

November 21, 1989

The Honorable Dennis DeConcini, Chairman
Subcommittee on Patents, Copyrights and Trademarks
SH-327
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for the opportunity to testify before your subcommittee on October 24, 1989, on the subject of moral rights in films, television, and other performing arts. I appreciate your willingness to hear our views and the thoroughness with which you addressed the issues.

I enclose herewith the answers to your supplemental questions. I hope this additional information is useful to you. Please do not hestitate to contact me if I can be of any further help.

Sincerely,

Roger L. Mayer

RLM:jc
enc.

cc to Ed Baxter
Cecilia Swensen
Bert Carp
Nell Payne

Question from Senator Leahy for Mr. Mayer:

Question: What is Turner's policy with regard to the distribution of black and white versions of films that have been colorized?

Answer: We have always had a vigorous policy of distributing the black and white versions of the movies we colorize through our broadcast syndication and video distribution subsidiaries. The black and white versions are freely available, aggressively marketed, and almost always the same price. Where there is a price differential, it is the colorized version which is more expensive, as is the case with the home video version of "Casablanca".

In the home video market, it appears that black and white versions do significantly better than colorized versions on an overall basis, by a factor of roughly two to one. Of course, the specific performance of each version differs depending on the particular movie. For example, orders for "Casablanca" in black and white are roughly 50 times greater than for the colorized version. Conversely, orders for the colorized version of "Allegheny Uprising" were almost 10 times greater than those for the black and white version. However, these are both extreme cases, and with most movies the demand is much more equal.

In the broadcast syndication market, we sell both the colorized and black and white versions. If both versions are purchased in the same market, we try to provide a 90-day window of exclusivity for the colorized version, during which a competing television station will not air the black and white version.

In addition to home video distribution and broadcast syndication, our colorized movies are also available on both of our general-entertainment cable channels: Superstation TBS and Turner Network Television (TNT).

Recently, Superstation TBS has run only the colorized versions. These movies have been mostly of the "action-adventure" genre, such as "Fort Apache", "The Charge of the Light Brigade", and "Fastest Gun Alive". On TNT, however, the black and white versions are shown where it makes sense in terms of the programming schedule, for example, theme weeks and film festivals. Examples include "Asphalt Jungle" and "Out of the Past".

Questions from Chairman DeConcini for Panel 3:

Question 1: Ms. Demasse, let me ask you and the other panel members a question which I have also directed to Mr. Oman. Your testimony indicates that moral rights legislation would limit the number of works that could be financed by the motion picture industry. Consequently, the public would have access to fewer pictures. However, if the directors' argument is correct, the motion pictures the public would have access to would presumably be free of alterations that marred the films' artistic qualities. Is it possible that the public interest might be best served by legislation that might limit public access to films, but foster films of higher artistic quality?

Answer: This result would not serve the public interest in any sense. The Constitution's grant of copyright is based on a desire to promote the vigorous production of artistic works and to encourage the widest possible public access to these works. Any government action which has the effect of limiting the creation of artistic works is an affront to this constitutional principle. The best way to ensure the creation of works of the highest artistic quality is to first ensure the creation of the greatest number of works.

Question 2: Some of you have indicated in your testimony that directors or other artists might use moral rights to increase their bargaining leverage with producers. Could Congress solve this problem by granting the artists moral rights which are inalienable, as do some European countries? Presumably, such rights, which cannot be bartered away, could not be used as a bargaining chip. I believe that the directors' proposal would allow an individual director to agree to waive his rights, but not allow him or her to sell them? Doesn't that proposal indicate that the directors are not in this for the money?

Answer: As yet, we have not seen any proposed legislative language on this issue, and so our response must be hypothetical.

Since only 10% of motion pictures are profitable in their initial theatrical release, the ability to alter films to take advantage of aftermarkets is generally essential to attract required investment capital. Creation of "moral rights" outside the normal rules of contract which allow artists to block or reduce access to aftermarkets threatens the capital structure of film making. Prohibiting directors from deriving financial benefit from waiving these rights might well make a bad problem worse. If there is no monetary benefit to a waiver, there would seem to be no motivation to act.

Question 3: You have all heard Mr. Fleming present the request of the American Society of Cinematographers: that films altered without consulting the original artists who created the work be prominently labeled as such. Such a disclaimer would protect the artist's reputation without generating the economic difficulties of a "moral rights veto" that many of you have objected to today. Would any of the other members of this panel object to such disclaimers being attached to films that are edited, panned and scanned, and so on?

Answer: As the Chairman is aware, TBS already labels all colorized movies according to the requirements of the National Film Preservation Act, and regardless of whether they are chosen for the National Film Registry.

Although we are willing to discuss additional labeling requirements, we believe that the interests and convenience of the viewing public should be given substantial weight. Additional labeling may be both annoying and unnecessary if the public is not being misled.

FLEMING & INGALLS
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November 28, 1989

VIA FEDERAL EXPRESS

Hon. Dennis DeConcini
Chairman
Subcommittee on Patents, Copyrights and Trademarks
c/o Committee on the Judiciary of the United States Senate
Hart Senate Office Building - 327
Washington, D.C. 20510-6275

Attention: Cecelia Swensen

Re: **American Society of Cinematographers**

Dear Senator DeConcini:

In reply to your letter of November 9, 1989, in which you enclosed three supplemental questions for inclusion in the hearing record, on behalf of the American Society of Cinematographers, we are pleased to respond as follows:

In response to Question No. 1, the American Society of Cinematographers does not condone censorship in any form. Nor does it condone the alteration of any original motion picture without either the prior consent of and collaboration with the creative artists or the insertion of labels on the altered version prominently informing the viewer of the unauthorized alterations. It has never been the A.S.C.'s position to act as a censor over what the public may or may not see or view, but rather to protect and preserve the integrity and reputation of the camerman's artistry.

In reply to Question No. 2, since the question does not directly apply to cinematographers, but rather to the directors, we feel a reply on behalf of the A.S.C. as to the directors' motives is inappropriate. We would, however, reiterate the A.S.C.'s position on moral rights: No persons should be able to either waive or sell their moral rights. Moral rights must remain inalienable and any attempt to alienate them should be in direct contravention of public policy and, therefore, null and void.

Question No. 3 solicits the responses of other participants at the hearing to the position that we, of the American Society of Cinematographers, have promulgated. Therefore, we need not respond.

Again, thank you for your kind invitation to include us in the Subcommittee's hearing process.

Very truly yours,

David W. Fleming

DWF:srk

National Association of NAB BROADCASTERS

Daniel Phythyon

Vice President, Congressional Liaison
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5306
(800) 424-8806

December 1, 1989

Ms. Cecilia Swensen
Subcommittee on Patents, Copyrights
and Trademarks
Room 327, Hart Office Building
United States Senate
Washington, D.C. 20510

Dear Ms. Swensen:

Attached are Mr. Jonathan Klein's answers to the Chairman's supplemental questions from the moral rights hearing on October 24, 1989. Mr. Klein and NAB appreciate the opportunity to supplement the record of that hearing.

Please let me know if we can provide you with additional information.

Sincerely,

JOSEPH R. BIDEN, Jr., DELAWARE, CHAIRMAN
EDWARD M. KENNEDY, MASSACHUSETTS
HOWARD M. METZENBAUM, OHIO
DENNIS DeCONCINI, ARIZONA
PATRICK J. LEAHY, VERMONT
HOWELL HEFLIN, ALABAMA
PAUL SIMON, ILLINOIS
HERBERT KOHL, WISCONSIN
STROM THURMOND, SOUTH CAROLINA
ORRIN G. HATCH, UTAH
ALAN K. SIMPSON, WYOMING
CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
GORDON J. HUMPHREY, NEW HAMPSHIRE
MARK H. GITENSTEIN, CHIEF COUNSEL
DIANA HUFFMAN, STAFF DIRECTOR
TERRY L. WOOTEN, MINORITY CHIEF COUNSEL
R.J. DUKE SHORT, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

November 9, 1989

Mr. Jonathan H. Klein
c/o Mr. Dan Phythyon
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

Dear Mr. Klein:

Thank you for taking time out of your busy schedule to testify at the oversight hearing on copyright moral rights in films, television and other performing arts held by my Subcommittee on Patents, Copyrights and Trademarks on October 24, 1989. The members of the Subcommittee are appreciative of having the benefit of your views, and your input will be extremely valuable to us as we consider this issue in the months ahead.

Please do not hesitate to include any additional related information that you feel will be beneficial to our hearing record, the general public and Congress. The hearing record will remain open until December 1, 1989.

I am also enclosing some supplemental questions for inclusion in the hearing record. Please return the questions with your answers to the attention of Cecilia Swensen by December 1, 1989.

Again, thank you for your participation in the hearing. I look forward to working with you in the future.

Sincerely,

Dennis DeConcini

DENNIS DeCONCINI
Chairman
Subcommittee on Patents,
Copyrights and Trademarks

DDC/cav
Enclosure

SENATOR DENNIS - ONCINI

QUESTIONS FOR PANEL 3

HEARING ON PERFORMING ARTS MORAL RIGHTS

OCTOBER 24, 1989

1) MS. DEMASSE, LET ME ASK YOU AND THE OTHER PANEL MEMBERS A QUESTION WHICH I HAVE ALSO DIRECTED TO MR. OMAN. YOUR TESTIMONY INDICATES THAT MORAL RIGHTS LEGISLATION WOULD LIMIT THE NUMBER OF WORKS THAT COULD BE FINANCED BY THE MOTION PICTURE INDUSTRY. CONSEQUENTLY, THE PUBLIC WOULD HAVE ACCESS TO FEWER PICTURES. HOWEVER, IF THE DIRECTORS' ARGUMENT IS CORRECT, THE MOTION PICTURES THE PUBLIC WOULD HAVE ACCESS TO WOULD PRESUMABLY BE FREE OF ALTERATIONS THAT MARRED THE FILMS' ARTISTIC QUALITIES. IS IT POSSIBLE THAT THE PUBLIC INTEREST MIGHT BE BEST SERVED BY LEGISLATION THAT MIGHT LIMIT PUBLIC ACCESS TO FILMS, BUT FOSTER FILMS OF HIGHER ARTISTIC QUALITY?

2) SOME OF YOU HAVE INDICATED IN YOUR TESTIMONY THAT DIRECTORS OR OTHER ARTISTS MIGHT USE MORAL RIGHTS TO INCREASE THEIR BARGAINING LEVERAGE WITH PRODUCERS. COULD CONGRESS SOLVE THIS PROBLEM BY GRANTING THE ARTISTS MORAL RIGHTS WHICH ARE INALIENABLE, AS DO SOME EUROPEAN COUNTRIES? PRESUMABLY, SUCH RIGHTS, WHICH CANNOT BE BARTERED AWAY, COULD NOT BE USED AS A BARGAINING CHIP. I BELIEVE THAT THE DIRECTORS' PROPOSAL WOULD ALLOW AN INDIVIDUAL DIRECTOR TO AGREE TO WAIVE HIS RIGHTS, BUT

NOT ALLOW HIM OR HER TO SELL THEM? DOESN'T THAT PROPOSAL INDICATE THAT THE DIRECTORS ARE NOT IN THIS FOR THE MONEY?

3) YOU HAVE ALL HEARD MR. FLEMING PRESENT THE REQUEST OF THE AMERICAN SOCIETY OF CINEMATOGRAPHERS: THAT FILMS ALTERED WITHOUT CONSULTING THE ORIGINAL ARTISTS WHO CREATED THE WORK BE PROMINENTLY LABLED AS SUCH. SUCH A DISCLAIMER WOULD PROTECT THE ARTIST'S REPUTATION WITHOUT GENERATING THE ECONOMIC DIFFICULTIES OF A "MORAL RIGHTS VETO" THAT MANY OF YOU HAVE OBJECTED TO TODAY. WOULD ANY OF THE OTHER MEMBERS OF THIS PANEL OBJECT TO SUCH DISCLAIMERS BEING ATTACHED TO FILMS THAT ARE EDITED, PANNED AND SCANNED, AND SO ON?

1. It is an accepted view of American life that our society benefits from having a diversity of programming from which the public may choose. That is consistent with the overall goal of our copyright law. I believe that Congress should reject proposals that would result in a reduction in that diversity. As I stated at the hearing, it is apparent that a moral rights regime would decrease the public's programming choices. Therefore, it does not seem that the public's interest, as opposed to the interests of the directors and others, would be served by decreasing the amount of available programming.

Other than the claims of the directors and screenwriters, there is no evidence that the public has rejected televised motion pictures that have been edited for such purposes, especially on the grounds that these pictures allegedly lack artistic qualities. In any event, because qualitative judgments are extremely subjective, it is especially troublesome to use these factors as a justification for direct or indirect government involvement in program content. Such decisions are appropriately left to the marketplace.

2. The practical effect of a moral rights regime would be to increase the uncertainties of providing programming to the public. Whether or not moral rights are alienable, broadcasters strongly oppose a scheme that would force them to grant editorial discretion

to third parties who have no familiarity with, or responsibility to, their local communities. As I stated at the hearing, broadcasters are licensed to serve local communities, and each licensee is responsible for the material it broadcasts. Furthermore, other editorial decisions made by a local broadcaster, such as editing for commercial insertions or for time constraints, all are part of the responsibilities that a local broadcast licensee owes to its local community.

3. NAB traditionally has strongly opposed legislative labeling requirements on programming. There are times when individual licensees voluntarily notify their audiences that editing has taken place or when some caution may be exercised by viewers. However, the decision to inform an audience rests properly with the licensee.

NAB is particularly concerned about the use of the label specified in the Film Preservation Act and the precedent that label creates. It is far different from the voluntary use of "Edited for Television." The label required by the Act is extremely pejorative for broadcasters who would air one of the 75 preserved films in which some editing has taken place. The audience has little or no appreciation or understanding of what constitutes a "material alteration," or panning and scanning or edits for content, etc.. All the audience will know is that they may not want to watch the film.

As a result, labeling may place broadcasters in the position of losing a significant portion of their audiences for employing editorial techniques which have been in use for 25 or more years, and which have aroused no opposition among the general public. These techniques are employed either by the copyright owner or by the local broadcast licensee in order to prepare a motion picture for broadcast. A significant amount of a movie's audience is in after theater release, on video cassettes, cable, or broadcast television. In order to prepare a movie for any of these three delivery systems, some editing is necessary. The type and amount of editing can best be agreed to by contract, between the copyright holder and the copyright licensee. While that fact may not meet with the approval of the directors or screenwriters, it is the method that has best served the needs and interests of the viewers in this country.

Arent, Fox, Kintner, Plotkin & Kahn

Washington Square 1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

Burton V. Wides
(202) 857-6035

December 27, 1989

Ms. Cecilia Swensen
Legislative Aide
Subcommittee on Patents,
Copyrights and Trademarks
327 Hart Senate Office Building
Washington, D.C. 20510

Dear Ms. Swensen:

Enclosed please find the responses of Ms. Jan DeMasse, representing the Video Software Dealers Association, to the post-hearing questions which Chairman DeConcini posed to supplement the hearing record.

If there are any questions regarding these supplemental answers, please do not hesitate to contact me.

Yours truly,

Burton V. Wides

Burton V. Wides
Legislative Counsel, Video
Software Dealers Association

BVW/ice
Enclosure

cc: Ms. Jan DeMasse

ANSWERS TO SUPPLEMENTAL QUESTIONS FOR PANEL 3
HEARING ON PERFORMING ARTS MORAL RIGHTS
OCTOBER 24, 1989

QUESTION #1: Ms. DeMasse, let me ask you and the other panel members a question which I have also directed to Mr. Oman. Your testimony indicates that moral rights legislation would limit the number of works that could be financed by the motion picture industry. Consequently, the public would have access to fewer pictures. However, if the directors' argument is correct, the motion pictures the public would have access to would presumably be free of alterations that marred the films' artistic qualities. Is it possible that the public interest might be best served by legislation that might limit public access to films, but foster films of higher artistic quality?

ANSWER: The directors' argument assumes, incorrectly, that altering the film so that it may be viewed in the most enjoyable form on television screens -- whether by prerecorded cassette, cable, or t.v. broadcast -- inherently lowers or lessens the "artistic quality" of the film. That proposition confuses two very distinct concepts: "artistic value" or "quality," on the one hand; and the directors' personal preference as to how they would like the film to be viewed on television size screens.

In the first place, as the hearing brought out, there are a great many artistic contributors to the film. If the director prefers to see the film on television in a letter-boxed fashion, while all the leading actors prefer to see it in a panned and scanned version, who is to say which version is of "higher artistic quality" for purposes of viewing on television? In any event, artistic quality or value is highly subjective. Certainly, many esteemed art critics and fine arts scholars often rate particular art works as being of lesser artistic quality than would the creating artist himself. Who is correct? The same analysis holds in the case of a film director, on the one hand, and the film critics who often disagree with the directors' view of the film's artistic qualities. In short, beauty is indeed in the eye of the beholder.

Therefore, it also is difficult to separate the concept of the "public interest" from the question of how to afford the public the greatest access to films, in the format that they most enjoy viewing. How else could one better define the public interest? Unless it is anchored concretely to consumer preference, the abstract notion of "greater public interest" is too vague and elusive. It only serves to highlight the dangers of the Congress' trying to judge which art forms, and methods of dissemination, best advance the "public interest."

On a practical level, the assumption that films provided only in formats dictated by the directors would "presumably be free of alterations that marred the film's artistic qualities" is also questionable. For example, directors may require that their films be letter-boxed. That technique distracts the viewer from a film's aesthetic qualities, and, particularly on smaller television sets, reduces the clarity of the picture and obscures important "artistic details."

In sum, even beginning to think about the assumptions and ramifications of this question amply illustrates what an entangling thicket the Congress enters when it seeks to make choices on the basis of "artistic quality."

QUESTION #2: Some of you have indicated in your testimony that directors or other artists might use moral rights to increase their bargaining leverage with producers. Could Congress solve this problem by granting the artists moral rights which are inalienable, as do some European countries? Presumably, such rights, which cannot be bartered away, could not be used as a bargaining chip. I believe that the directors' proposal would allow an individual director to agree to waive his rights, but not allow him or her to sell them? Doesn't that proposal indicate that the directors are not in this for the money?

ANSWER: Unfortunately, since this initial hearing was held prior to the directors' circulating any specific legislative proposals for comment by other interested parties, it is difficult to comment in any detail on this vaguely outlined concept. We assume that there will be an opportunity to do so if any proposal were introduced in the form of actual legislation in the future. For now, I would only note that even if a director's veto over particular formats for post-theatre markets was "inalienable," and could not be bartered away, this would not necessarily be the end of economic bargaining leverage. The director could still bargain, as part of his or her contract, <u>not to exercise</u> that inalienable right.

In other words, the question assumes that a veto right which cannot be bartered away <u>also</u> "could not be used as a bargaining chip." This is incorrect, as the next sentence of the question itself points out. If the director has the ability "to waive" the exercise of the right, then he could negotiate such a waiver in advance as part of the initial contract for directing the movie. The waiver presumably would be in return for a substantially greater fee

than he would otherwise have been able to negotiate. In short, this proposal still could enable the directors to use the right as a bargaining chip in their economic negotiations with film producers.

QUESTION #3: You have all heard Mr. Fleming present the request of the American Society of Cinematographers: that films altered without consulting the original artists who created the work be prominently labeled as such. Such a disclaimer would protect the artist's reputation without generating the economic difficulties of a "moral rights veto" that many of you have objected to today. Would any of the other members of this panel object to such disclaimers being attached to films that are edited, panned and scanned, and so on?

ANSWER: VSDA would object to such disclaimers on a number of grounds. First, as I pointed out at the hearing, the cumulative effect of various disclaimers, notices and warnings required to accompany films on videocassette, whether on the package or as an insert in the tape itself, at some point become burdensome to the viewer and decrease the enjoyability of this form of home entertainment.

Second, it is not clear who would be responsible: for determining that such disclaimers were included; for reviewing the adequacy of disclaimers; or for determining whether a disclosure was required. Each of those questions would have to be answered, in light of the degree to which the film had been altered, and in light of the statutory language that had been enacted. Placing any of those responsibilities on the dealer, of course, would be extremely unfair and unreasonably burdensome.

Third, we would not agree with the implication that such a disclaimer might give our customers, namely, they would find that the videocassette version was of significantly inferior artistic quality, or not enjoyable.

Senator DECONCINI. The subcommittee will stand in recess, subject to the call of the Chair.

[Whereupon, at 12:38 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

ADDITIONAL SUBMISSIONS FOR THE RECORD

PRODUCERS GUILD OF AMERICA, INC.

400 SOUTH BEVERLY DRIVE · BEVERLY HILLS, CALIFORNIA 90212

(213) 557-0807

October 26, 1989

Mr. Ed Baxter
Sub-Committee on Patents, Copyrights
and Trademarks
327 Hart SOB
Washington, D.C. 20510

Dear Mr. Baxter:

Enclosed herewith, at the recommendation of Eric Schwartz of the U.S. Copyright Office, is a copy of a report on MORAL RIGHTS AS THEY APPLY TO THE MOTION PICTURE INDUSTRY, from the viewpoint of the professional career producer. I hope this will reach you before the deadline for submission for inclusion with materials arising out of the October 24, 1989 hearings of the Senate Sub-Committee on Patents, Copyrights and Trademarks.

You will see that this report takes a middle course that in some instances is at variance with the positions adopted by the Motion Picture Association of America and the Alliance of Motion Picture and Television Producers, and in other instances at variance with the Directors Guild of America. In some instances, it is at variance with both.

It also spells out the role of the professional producer, who has unfortunately been overlooked in the hearings to date.

I am confident that Senator DeConcini and his committee will find the information in this report of value in their deliberations.

Sincerely,

Charles B. FitzSimons
Executive Director

CBF:mjm
Enc.

PRODUCERS GUILD OF AMERICA, INC.

400 SOUTH BEVERLY DRIVE • BEVERLY HILLS, CALIFORNIA 90212

(213) 557-0807

October 30, 1989

THE PRODUCERS GUILD OF AMERICA

MORAL RIGHTS AS THEY APPLY TO THE MOTION PICTURE INDUSTRY

My name is Charles B. FitzSimons. I am the Executive Director of the Producers Guild of America, Inc., and a professional career producer.

The Producers Guild of America, Inc. represents a substantial number of career producers in the motion picture and television industry. Career producers are not to be mistaken for production companies, which frequently indentify themselves collectively as "the producers". This is an historical misnomer in the motion picture and television industry that has led to considerable confusion. It is important that you recognize our separate identities and viewpoints.

We are the hands-on career professionals who actually make the motion pictures for the production companies. We initiate, co-ordinate and supervise, on their behalf, all aspects of the motion picture making process, creative, technological, financial and administrative, throughout all phases from inception to completion, including the co-ordination and supervision of all other creative talents and crafts.

The professional career producer, as a prime creative contributor to the motion picture making process, claims to be entitled to the moral rights of attribution and integrity granted under Article 6 of the Berne Convention.

The members of the Producers Guild of America vary from the strict

employee producer, whose moral rights may be the only rights the producer has, to the influencial entrepreneur producer, who, as a copyright owner, co-venturer, or profit participant, has a vested interest in protecting the marketing rights of the copyright holder.

As their Executive Director, I must serve them both and strive for a balance that is both pragmatic and fair. In this we share a common purpose, and have the same basic questions to resolve.

To that end, the following are my suggestions. In certain instances they are at variance with the positions adopted by the production companies, in other instances at variance with the positions adopted by the Directors Guild of America. In some instances, at variance with both.

MORAL RIGHTS - THEIR APPLICATION

Moral rights should apply to all motion pictures, good and bad. They should not be restricted to a select number of "classics".

All creative contributors to the motion picture making process should be entitled to moral rights, not merely the principal director and screenwriter. Motion picture making is a collaborative process.

In the case of all motion pictures made, this should include the career producer, the principal director, the writer of both the original souce material and the screenplay, the actor, the cinematographer, the art director/production designer, the editor, and the composer.

In the case of individual specialty motion pictures, this list could be expanded to include choreographers, special optical effects, special

mechanical effects, make-up and hair, costumers, set decorators, sound recorders and mixers, and any one of the many other talents involved, depending on the extent and impact of their individual creative contributions.

COLLECTIVE BARGAINING AND INDIVIDUAL CONTRACT

Can moral rights in the motion picture industry be adequately protected by collective bargaining, or individual contract? The answer is unequivocally, NO!

Moral rights and negotiation are a contradiction in terms. "Rights", if indeed they are "rights" (like civil rights) must exist without the need to be bargained for, nor should they be able to be bargained away. True "rights" can neither be acquired, nor waived. Only privileges, in excess of rights, can be negotiated.

More specifically, in the motion picture industry, collective bargaining is neither universal, nor uniform. It does not apply to all creative contributors, and where it does apply it does not apply equally. Nor is it immune from roll-back.

Moral rights must apply equally and to all.

The career producer, who is a prime creative contributor, is not entitled to collective bargaining! His right to collective bargaining has been repeatedly and consistently denied by those same production companies that would have you believe that moral rights can be adequately protected by collective bargaining. By claiming that the career producer is a supervisor and part of Management they have been able to deprive him of that right. The denial has been legally re-inforced by an adverse decision of the NLRB, from which there is no appeal.

The same applies to composers. They too have been denied the right to Collective Bargaining. Also re-inforced by an adverse decision of the NLRB. And who is to say, that at some time in the future, directors and cinematographers may not become similarly deprived, on the basis of that same claim, that they too are supervisors. The NLRB has already made this ruling in the case of directors.

Moral rights must not be dependent on the goodwill of Management, or the endorsement of the NLRB.

In addition to the fact that collective bargaining does not apply universally, it also does not apply uniformly. Successful collective bargaining is always a matter of "clout". "Clout" comes in varying degrees. Some have it, some don't. Moral rights must not be restricted to those who do.

The same argument applies to individual contract. It too depends on "clout". In negotiations, the disadvantaged inevitably become the deprived.

Moral rights must never be dependent on "clout".

NEW LEGISLATION - A UNIFIED FEDERAL SYSTEM OF MORAL RIGHTS

Is new legislation of a uniform federal system of moral rights necessary and is there a "meritorious public purpose" to be served? My answer would have to be YES!

The facts speak for themselves. If the law were sufficiently clear and explicit, as it currently exists, there would not now be so many divergent points of view.

Confusion of law is never in the public interest. Neither is it in

the best interests of the copyright owner, nor the creative contributor. Moral rights in the motion picture industry need to be conclusively defined and their application clearly stated, in all of the areas in dispute.

When proposing the implementing legislation that brought the United States into the Berne Convention, the Legislature was faced with a very real problem. Unless it could successfully sidestep the inclusion of specific moral rights clauses, the legislation would never pass.

So, the proponents limited themselves to two very general pronouncements:

(1) that moral rights under the existing body of American law - Federal, State and Common Law - at the time of joining the Berne Convention, were not less than those required under the Berne Convention, and

(2) that by virtue of joining the Berne Convention, these moral rights were neither expanded nor reduced.

All that these pronouncements tell us is, that our moral rights, whatever they may be, are now not less than the moral rights guaranteed by the Berne Convention, whatever they are, and not more than the moral rights we already had, whatever they were!

They tell us nothing about the moral rights themselves, or how they would apply to specific motion picture industry practices. Discussion and dissent ever since have shown that this can not be evaded forever. Existing legislation is incomplete. Additional legislation is required. The need won't just go away.

Although it is true that certain aspects of moral rights in motion pictures could be litigated under the overall blanket of the Lanham Act, this does not obviate the need for new legislation. It would

take a body of case law, developed over a long period of time (if ever), at great public and private expense, to achieve what could be achieved instantaneously by one legislative act. Motion picture practices are so complex and so singular in nature that something more than blanket legislation is required.

The Lanham Act merely invites litigation. New legislation should deter breach!

In the final analysis, in order to avoid any suspicion of continued evasion, the real question should not be "is the current situation adequate", but "can it be improved"?

MORAL RIGHT OF INTEGRITY -
TECHNOLOGICAL ALTERATIONS TO MOTION PICTURES

I will deal with the moral right of integrity first, because it has raised the most controversy to date.

In the area of technological alternations to motion pictures, there has been exhaustive discussion as to how the marketing rights and practices of motion picture copyright owners should, or should not, be affected by this moral right.

This has led to an attempt to distinguish between alterations to motion pictures on a basis of whether or not the alteration involved is a "material" alteration. Since this is a matter of opinion, between widely conflicting interests, it, in turn, has led to inevitable discussion and dissent, to which there may be no satisfactory resolution.

For this reason I propose to examine motion picture marketing practices simply on the basis of whether or not a change of ingredients or an alteration of content is involved (fact) and with

this as the sole criterion to decide whether or not a particular marketing practice should be permitted and, if permitted, what conditions, if any, should be imposed.

Where there has been no change of ingredients or alteration of content it would be hard to see how the professional reputation of the creative contributor could reasonably be jeopardized.

For example, insertion of commercial messages etc., is merely an interruption in transmission, not a change of ingredients or an alteration of content. No matter how disruptive, distasteful or inexpertly performed, the professional reputation of the creative contributor is not at stake.

Similarly, "letterboxing" is merely an exhibition format and not a change of ingredients or an alteration of content.

However, "colorization" is a change of an ingredient. "Editing for length" and "lexiconning" are alterations in content. So also, is "panning-and-scanning"! Each of which I will deal with separately later.

As a general principle, I propose that the copyright owner must have the absolute right, at his/her discretion, to "colorize" and to make the minimum alterations to content necessary to exploit all markets.

This is not only in the selfish interests of the copyright owner, but in the best interests of the public and, ultimately, the long-term interests of the creator.

Those who supply the very considerable financing on which the creator will again depend for future creations, must have an un-

restricted right to recoup and make a profit, otherwise the financing will eventually dry up.

"Colorization" could not exist commerically, unless there was a demand for it. Motion pictures are not made as art objects for a limited coterie of sophisticates to admire. They are made for general consumption. Otherwise, they would never be financed. It is unrealistic for the creative community to expect the potential mass audience to be as creatively perceptive as they are.

Either by choice or by compulsion, members of a vast section of the public prefer to watch an altered version of a motion picture in their own homes, rather than a pristine version in a theatre. They may not have the money, or the time. They may not have the transportation. They may be disabled, or fear crowds. They may prefer the convenience, or just not be motivated. They should not be deprived of that right.

On the other hand, it is also in the public interest and the interest of the creative contributors that those same audiences should not be abused by "colorization" that could have been improved, or alterations in content that are not necessary, or not made as expertly as they should.

On this basis, even though the copyright owner must have the absolute right, at his/her discretion, to "colorize" and to make the minimum alterations in content necessary to exploit all markets, these should be done only with the direct participation of the career producer and director, and in the case of "colorization", with the participation also of the cinematographer. Where this is impossible, it should be their nominees, or the nominees of their Guilds.

In short, the copyright owner should have the right to decide <u>if</u>

a motion picture is to be "colorized", or if alterations in content are to be made, but the career producer and director, and where applicable the cinematographer, should have the right to decide how.

A mere right of consultation by the director, as achieved by the Directors Guild in collective bargaining, is not sufficient. Consultation can mean everything and nothing, and anything in between. Additionally, the career producer must also have the right to be involved.

Unfortunately, past experience of the creative community has been that alterations to content made without the direct participation of the career producer and director have been unnecessarily uncreative, uncaring and inexpertly performed.

COLORIZATION

"Colorization" of certain black and white motion pictures, where shadings and contrast were deliberately planned for cinematic effect, will always be a creative affront. But as long as the original black a white version is preserved, as it now must be by law, and prints available to view, it must be tolerated.

"Colorization" of many black and white motion pictures is inconsequential. "Colorization" of others may actually be a creative improvement! I deliberately watched the colorized version of the original "Mutiny on the Bounty". I was interested to find out what they had been able to achieve with the blue of the sky, the grey-green of the sea, the texture of the wooden sailing ships, the costumes of the crew and the lush vegitation of the tropical island, all of which would have contributed so much more to the original production had they been in color. I must confess that it worked admirably for me.

Black and white motion pictures in the future will be few and far between and will undoubtedly have "colorization" fully covered by contract.

I would like to divert for a moment to call attention to the reverse of "colorization" - desaturation, due to age, of motion pictures originally filmed in color. The transmission on television of faded, worn-out color prints of motion pictures carefully crafted in color, is a professional affront to the cinematographer, career producer and director and the many other creative contributors to the original color motion picture.

PANNING-AND-SCANNING

"Panning-and-scanning" involves a very definite and quite extensive alteration in content and will always be creatively deficient. It is a particular assault on the craft of the director, who will have deliberately composed each frame dramatically and cinematically for the original aspect ratio. To contend that "panning-and-scanning" is not a material alteration to a motion picture is absurd when one considers the extent and amount of change involved. Such a contention would appear to be either self-serving or uninformed.

However, where "panning-and-scanning" is required, the degree of creative deficiency can vary widely with the creativity and professional expertise of those who plan and execute the process. Obviously, the director and career producer would best know how.

Currently, the extreme wide screen aspect-ratio is out of vogue, but it could return. The problem should not be ignored.

EDITING TO LENGTH AND LEXICONNING

A change in the length of a motion picture, either by editing out footage or by "lexiconning" is a change in content and should only be done with the direct participation of the career producer and director. They are the most familiar with the film and are the best equipped to know what footage can be lost and how to lose it, with the least creative damage. Alternately, they are also the best equipped to know what footage, if any, can be speeded up, and to what extent, and what can not.

LABELING OF ALTERED MOTION PICTURES

If the content of a motion picture has been altered, or, if a motion picture has been "colorized", it should be labeled as such. This should apply in all instances, to motion pictures good and bad, and not merely to a select number of classics. The labeling, however, should be limited to a simple statement of fact, i.e., that the motion picture has been "colorized", or that its content has been altered from the version first released, and no more.

It is the "fact" of "colorization" and the "fact" of alteration of content that should be brought to the attention of the viewer, not whether or not it had, or didn't have, the consent of specified or unspecified creative contributors.

The statement of fact adequately protects both the creative contributors' moral rights and the public's right to be informed.

THE MORAL RIGHT OF ATTRIBUTION

This is the basic moral right that in effect protects the creative contributor to a motion picture from non-attribution of credit for

his/her creative contribution. Equally important, it also protects the creative contributor from mis-attribution of that credit, in whole or in part, to somebody else.

To date, the moral rights controversy in Washington has concentrated on the moral right of integrity. The right of attribution has largely been overlooked. This is because the concentrated campaign against "colorization" and material alterations to motion pictures has been carried forward by labor organizations whose right of attribution is adequately protected by the credits clauses in their collective bargaining agreements. They have had no need to bring it up. They are already assured that they, and only they, will receive the credit for their work.

This is not so with the career producer. As I have previously stated, the career producer does not have a collective bargaining agreement. As a result, in negotiations the producer credit has become a "contractual cookie", offered by Management to all and sundry as an added inducement to make a deal, and demanded by non-producers with bargaining "clout" as a "bonus", with total disregard for the ability or intention to perform the producer function.

Because of this, unjustifiable producer credits have proliferated to such a ridiculous extent that as many as thirteen producer credits have been counted on one television project. The true producer, entitled to the credit, gets hopelessly lost in the crowd, with no way for the viewer to identify which one the true producer is.

The proliferation of producer credits has created so much "clutter" that the AMPTP has had to request its member companies, and the CBS Television Network has had to request its program suppliers, that they "restrict producer credits to those who actually perform producer functions".

This blatant mis-attribution of producer credits is obviously in flagrant breach of Article 6 of the Berne Convention. It is ineligible for redress through collective bargaining, and can only be dealt with by specific moral rights legislation.

CONCLUSIONS

I respectfully submit, on the basis of the arguments I have presented:

(1) that moral rights in the motion picture industry cannot be adequately protected by collective bargaining or individual contract.

(2) that moral rights in the motion picture industry are not adequately defined by the Berne Implementation Act and the existing body of American Law - Federal, State and Common Law.

(3) that new legislation of a federal system of moral rights is needed, and there is a "meritorious public purpose" to be served.

* * *

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October 30, 1989

Senator Dennis DeConcini
Subcommitte on Copyrights,
Trademarks, Patents of
The Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Attention: Cecilia Swenson

Dear Senator DeConcini:

It is with great urgency that I, as President of the International Photographers Guild, write to defend the moral rights of cinematographers and to support the position articulated by the Directors, the Screen Writers and Screen Actors Guilds. Our Guild is well qualified for this task because it is not only the largest photographers union in the world, but also because for more than sixty years it has fought for the artistic rights of cinematographers in collective bargaining negotiations with major Hollywood producers. Our members achievements are legendary; they have won more Oscars, Emmys and Clios than members of any other photographers guild.

Based on this experience, the Guild believes present copyright laws must be amended to include the concept of moral rights as defined by the Berne Treaty. Present U.S. law is an inadequate, one-sided patchwork that gives lip service to moral rights while it allows producers to pan and scan, colorize and otherwise deface a motion picture without having to consult any of a film's three principal creators, namely the director, the writer and cinematographer.

Indeed, in order to prevent the defacement of our national film heritage, American law must clearly state that no film shall be materially altered without the express consent of the motion picture's principal author(s).

In this light, our Guild must take serious issue with last week's statement by David W. Fleming, General Counsel for The American Society of Cinematographers (ASC). Although Mr. Fleming's statement correctly pinpointed the pivotal role played by the director, writer and cinematographer in the creation of a motion picture, it concluded that the mere insertion of disclaimers at the beginning and end of a film would be enough to protect the moral rights of these artists.

Mr. Fleming's statement makes a mockery of the Berne Treaty. If accepted it would legitimize the defacement of films without the consent of the creator. It would reduce artists to the role of eunuchs whose only right is to whimper a few words after the emasculation has taken place. Moreover, Mr. Fleming's position would place the fate of America's film legacy in the hands of faceless defacers whose only motivation is to increase the already bloated profits of the major Hollywood producers.

Contrary to what Mr. Fleming suggests, U.S. producers are not one step away from bankruptcy. They are in fact among America's most prosperous enterprises. One needs only to have invested in Disney stock over the past three years to recognize this fact. Indeed, as the October 16, 1989 issue of Business Week points out, producer prosperity is fueling foreign takeovers such as Sony's recent purchase of Columbia Pictures. "There are good strategic reasons to go Hollywood", says the magazine. "The entertainment business is exploding overseas, and American-made movies, TV shows are popular with audiences worldwide."

Nor are the producers or Mr. Fleming correct in assuming that the movie industry's ability to adapt motion pictures to numerous new markets will be seriously hampered by acknowledging artists moral rights. On the contrary, moral rights as outlined by the Berne Treaty merely give the artist the right to object to defacements. As the producers are well aware, in many cases no objections would be made. However, if the film's principal author, the director, chooses to object to pan and scan, editing or colorizing techniques, a neutral judge would decide whether the artist's concerns have merit. This in no way gives the artist "veto-power" as Mr. Fleming would have you believe. Rather, it mandates a fair way to resolve artistic issues of great moment. If such a procedure were made a part of U.S. law, creative artists would have the moral right to object to the heretofore untrammeled power of the producer to tarnish, deface and disfigure timeless works of art, works that comprise an invaluable part of America's heritage.

For these reasons, the International Photographers Guild as the exclusive bargaining agent of cinematographers, stands together with other creative guilds in supporting moral rights.

Sincerely,

George Spiro Dibie
President

cc: Lenny South, President, ASC
Glen Gumpel, Executive Director, DGA
Elliott Silverstein, President's Committee, DGA
Brian Walton, Executive Director, WGA
Ken Orsatti, Executive Director, SAG
Lou D'Agostino, Local 644, IATSE
Larry Gianneschi, Local 666, IATSE

GSD/BD/sl

Bob COLLINS
cinematography

Senator Dennis DeConcini
Copyrights/Trademarks
U.S.Senate
Washington D.C. 20510

November 21,1989

RE [redacted] Rights/Films

As a Director of Photography in the Motion Picture Industry for more than twenty years I wish to object to the deterioration of our rights as to the presentation of our work.

We feel that copyright protection should be afforded our craft along with the rights of screen writers and directors.

The work that we do has subtile meaning that may me ignored by the technicians that are called upon to "prepare it for broadcast etc."

Please take whatever steps you can to protect our work from unnecessary defacement.

I might add that Atty. David W. Fleming does not represent the large majority of Directors of Photography and his views do not reflect the feelings of us all.

Thank You for your consideration.

Robert E. Collins
Director of Photography

cc: International Photographers Guild

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